

35  
No. 92-515

Court, U.S.

FILED

FEB 26 1993

OFFICE OF THE CLERK

In The  
**Supreme Court of the United States**  
October Term, 1992

WISCONSIN,

*Petitioner,*

v.

TODD MITCHELL,

*Respondent.*

On Writ Of Certiorari  
To The Supreme Court Of Wisconsin

**BRIEF OF RESPONDENT**

KENNETH P. CASEY  
*Counsel of Record*  
ELIZABETH E. STEPHENS  
131 W. Wilson Street,  
Suite 100  
Madison, Wisconsin 53707  
(608) 267-0311

LYNN S. ADELMAN  
PAMELA MOORSHEAD  
ADELMAN, ADELMAN & MURRAY, S.C.  
308 E. Juneau  
Milwaukee, Wisconsin 53202  
(414) 225-2920

SUSAN GELLMAN  
8 East Long Street  
Columbus, Ohio 43266-0587  
(614) 466-5394

*Attorneys for Respondent*

## TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE .....	1
SUMMARY OF THE ARGUMENT .....	2
ARGUMENT.....	4
I. THE WISCONSIN SUPREME COURT CON- STRUED SECTION 939.645 AS PUNISHING MOTIVES.....	4
II. SECTION 939.645 PUNISHES OFFENDERS' THOUGHTS BY SINGLING OUT FOR EXTRA PUNISHMENT CERTAIN MOTIVES ON THE BASIS OF THEIR CONTENT AND VIEW- POINT IN VIOLATION OF THE FIRST AMENDMENT .....	6
A. SECTION 939.645 PUNISHES BIGOTED THOUGHT AND IS THEREFORE SUB- JECT TO STRICT SCRUTINY .....	6
1. Section 939.645 imposes greater penal- ties solely on the basis of the con- tent and viewpoint of the offender's motive .....	6
2. Motive is distinct from intent and pur- pose .....	11
3. Section 939.645 is not within the rule of <i>United States v. O'Brien</i> .....	13
4. <i>Dawson v. Delaware</i> and <i>Barclay v. Flor-</i> <i>ida</i> do not stand for the proposition that bigoted motive may be an element of a criminal offense.....	16
B. THE HATE CRIME LAW DOES NOT SUR- VIVE STRICT SCRUTINY .....	18

## TABLE OF CONTENTS – Continued

## Page

1. Wisconsin's asserted state interests do not justify a content- and viewpoint-specific statute.....	19
2. The content and viewpoint specificity of Section 939.645 is not necessary to serve a compelling state interest .....	24
3. Section 939.645 is not narrowly tailored ..	27
III. SECTION 939.645 IS SUBSTANTIALLY OVERBROAD IN THAT IT ENHANCES PENALTIES FOR "FIGHTING WORDS" AND OTHER PUNISHABLE EXPRESSION ON A CONTENT- AND VIEWPOINT-SPECIFIC BASIS .....	31
IV. SECTION 939.645 IS IMPERMISSIBLY DEPENDENT UPON THE DEFENDANT'S FIRST AMENDMENT ACTIVITY FOR PROOF OF MOTIVE, AND CHILLS OTHERS' EXPRESSION AND ASSOCIATION PROTECTED BY THE FIRST AMENDMENT.....	34
V. SECTION 939.645 IS NOT ANALOGOUS TO EXISTING ANTI-DISCRIMINATION LAWS ...	37
VI. SECTION 939.645 DISCRIMINATES AMONG OFFENDERS BASED SOLELY UPON THE EXERCISE OF THEIR FUNDAMENTAL RIGHTS OF THOUGHT AND EXPRESSION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT .....	43

## TABLE OF CONTENTS – Continued

## Page

VII. SECTION 939.645 IS UNCONSTITUTIONALLY VAGUE, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, BECAUSE IT GIVES INADEQUATE NOTICE OF THE PROHIBITED ACTIVITY AND INVITES ARBITRARY AND DISCRIMINATORY ENFORCEMENT.....	45
CONCLUSION .....	48
APPENDIX .....	App. 1

## TABLE OF AUTHORITIES

## Page

## CASES CITED

<i>Aboud v. Detroit Bd. of Educ.</i> , 431 U.S. 209 (1977) ..	7, 10
<i>Barclay v. Florida</i> , 463 U.S. 939 (1983).....	16, 17, 18
<i>Barnes v. Glen Theatre, Inc.</i> , 111 S. Ct. 2456 (1991)	14, 15
<i>Beauharnais v. Illinois</i> , 343 U.S. 250 (1952).....	6
<i>Board of Directors of Rotary Int'l v. Rotary Club</i> , 481 U.S. 537 (1987).....	41
<i>Bollenbach v. United States</i> , 326 U.S. 607 (1946) .....	47
<i>Boos v. Barry</i> , 485 U.S. 312 (1988).....	24
<i>Brandenburg v. Ohio</i> , 395 U.S. 447 (1969) .....	20
<i>Bray v. Alexandria Women's Health Clinic</i> , 113 S. Ct. 753 (1993).....	21, 41
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973) .....	31, 33
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942) ....	31
<i>Coates v. City of Cincinnati</i> , 402 U.S. 611 (1971)..	36, 48
<i>Collin v. Smith</i> , 578 F.2d 1197 (7th Cir.), <i>cert. denied</i> , 439 U.S. 916 (1978).....	9, 20, 22
<i>Dawson v. Delaware</i> , 112 S. Ct. 1093 (1992) ...	16, 17, 18
<i>Dombrowski v. Pfister</i> , 380 U.S. 479 (1965).....	31
<i>Dowling v. United States</i> , 473 U.S. 207 (1985).....	47
<i>Erzoznik v. City of Jacksonville</i> , 422 U.S. 205 (1975) ....	30
<i>F.C.C. v. League of Women Voters</i> , 468 U.S. 364 (1984).....	30

## TABLE OF AUTHORITIES – Continued

## Page

<i>Florida Star v. B.J.F.</i> , 491 U.S. 524 (1989).....	30
<i>Forsyth County v. Nationalist Movement</i> , 112 S. Ct. 2395 (1992).....	20
<i>Girouard v. United States</i> , 328 U.S. 61 (1946) .....	4
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972) .....	31, 45, 47
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) .....	38
<i>Grimm v. Churchill</i> , 932 F.2d 674 (7th Cir. 1991).....	36
<i>Hudnut v. American Booksellers Ass'n</i> , 771 F.2d 323 (7th Cir. 1985), <i>aff'd</i> , 475 U.S. 1001 (1986).....	20
<i>Jurek v. Texas</i> , 428 U.S. 262 (1976).....	12, 13
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983) .....	47
<i>McCormick v. United States</i> , 111 S. Ct. 1807 (1991) ....	47
<i>N.A.A.C.P. v. Button</i> , 371 U.S. 432 (1963).....	33
<i>New York State Club Ass'n v. City of New York</i> , 487 U.S. 1 (1988) .....	41
<i>People v. Grupe</i> , 532 N.Y.S. 2d 815, 818 (N.Y. City Crim. Ct. 1988) .....	34
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982) .....	43
<i>Police Dept. v. Mosley</i> , 408 U.S. 92 (1972).....	44
<i>R.A.V. v. City of St. Paul, Minnesota</i> , 112 S. Ct. 2538 (1992).....	<i>passim</i>
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984) ....	41

## TABLE OF AUTHORITIES – Continued

	Page
<i>Screws v. United States</i> , 325 U.S. 91 (1945) .....	39
<i>Simon &amp; Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.</i> , 112 S. Ct. 501 (1991).....	8, 9, 10, 18, 27
<i>Smith v. Goguen</i> , 415 U.S. 566 (1974) .....	48
<i>State v. Beebe</i> , 680 P.2d 11 (Or. App. 1984).....	34
<i>State v. LaDue</i> , No. 4008-8-90 CM. Cr. (Chittenden Cty., Vt. Apr. 18, 1991), <i>appeal docketed</i> , No. 91-313 (Vt. Aug. 5, 1991) .....	34
<i>State v. Mitchell</i> , 485 N.W.2d 807 (Wis. 1992).....	<i>passim</i>
<i>State v. Plowman</i> , 838 P.2d 558 (Or. 1992) .....	28, 34
<i>State v. Stalder</i> , No. 91-01892 10A (Broward Ct., Fla., Apr. 20, 1992), <i>jurisdiction accepted</i> , No. 79, 924 (Fla., June 10, 1992) .....	34, 47
<i>State v. Wyant</i> , 597 N.E.2d 450 (Ohio 1992).....	<i>passim</i>
<i>State v. Zwicker</i> , 164 N.W.2d 512 (Wis. 1969) .....	32
<i>Street v. New York</i> , 394 U.S. 576 (1969) .....	22, 34
<i>Teamsters v. United States</i> , 431 U.S. 324 (1977) .....	38
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989)....	8, 9, 15, 21, 23, 44
<i>Tinker v. Des Moines Indep. Community Sch. Dist.</i> , 393 U.S. 503 (1969).....	8
<i>Tygett v. Washington</i> , 543 F.2d 840 (D.C. Cir. 1974) ....	35
<i>United States v. Eichman</i> , 496 U.S. 310 (1990) ...	8, 9, 21, 23
<i>United States v. Lemon</i> , 723 F.2d 922 (D.C. Cir. 1983) ....	14
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)....	9, 13, 14, 21

## TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Schwimmer</i> , 279 U.S. 644 (1929) .....	4
<i>United States v. Skillman</i> , 922 F.2d 1370 (9th Cir. 1990), <i>cert. denied</i> , 112 S. Ct. 353 (1991) .....	26
<i>Wayte v. United States</i> , 470 U.S. 598 (1985).....	14
<i>West v. Adkins</i> , 487 U.S. 40 (1988) .....	38
<i>Williams v. New York</i> , 337 U.S. 250 (1949).....	17
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977).....	7, 10

## CONSTITUTIONAL PROVISIONS CITED

## Federal

First Amendment, U.S. Const. ....	<i>passim</i>
Fourteenth Amendment, U.S. Const. ....	4, 39, 43, 45

## State

Wisconsin Constitution art. XIII, section 2.....	17
--	----

## STATUTES AND RULES CITED

## Federal

18 U.S.C. § 242.....	39
18 U.S.C. § 243.....	39
18 U.S.C. § 245(b)(2).....	39
18 U.S.C. § 3631.....	39
42 U.S.C. § 1981.....	38
42 U.S.C. § 1983.....	38
42 U.S.C. § 1985 (3) .....	40, 42
42 U.S.C. § 2000a (b)(1).....	41

## TABLE OF AUTHORITIES – Continued

	Page
42 U.S.C. § 2000e (b) .....	41
42 U.S.C. § 3604 (B)(2) .....	41
U.S.S.G. § 3A1.1 .....	26
State	
Ohio Rev. Code § 2927.12 .....	6, 7
Wis. Stats. § 939.645 .....	<i>passim</i>
Wis. Stats. § 942.01 .....	32
Wis. Stats. § 942.03 .....	32
Wis. Stats. § 943.30 .....	32, 33
Wis. Stats. § 943.31 .....	32, 33
Wis. Stats. § 944.20 .....	32
Wis. Stats. § 944.21 .....	32
Wis. Stats. § 944.23 .....	32
Wis. Stats. § 946.31 .....	32
Wis. Stats. § 946.32 .....	32
Wis. Stats. § 946.46 .....	32
Wis. Stats. § 946.64 .....	32
Wis. Stats. § 947.01 .....	32
Wis. Stats. § 947.013 .....	32
1991 Wis. Act 291 .....	28, 46

## TABLE OF AUTHORITIES – Continued

	Page
OTHER AUTHORITIES	
Anti-Defamation League, <i>1992 Audit of Anti-Semitic Incidents</i> (1992) .....	19, 40
1 Edward J. Devitt et al., <i>Federal Jury Practice and Instructions</i> , § 17.06 (4th ed. 1992) .....	11
FBI Preliminary Report .....	20, 36, 48
<i>Hate-Crime Charge Dropped Against Black Man in Florida</i> , N.Y. Times, Aug. 31, 1991, at 10, col. 6 ....	36
Martin B. Margulies, <i>Intent, Motive and the R.A.V. Decision</i> , Crim. Just. Ethics, Summer/Fall 1992, at 42 .....	11
Martin H. Redish, <i>Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory</i> , Crim. Just. Ethics, Summer/Fall 1992, at 29 .....	10
Ralph S. Brown, <i>Susan Gellman Has It Right</i> , Crim. Just. Ethics, Summer/Fall 1992, at 46 .....	13
Sandra Coliver, <i>Hate Speech Laws: Do They Work? in Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination</i> 363 (Sandra Coliver et al., eds., 1992) .....	36
<i>Super Bowl Sunday: A Day for Fans, Food, Fun – And Domestic Violence</i> , Chi. Trib., Jan. 29, 1993 .....	20
Susan Gellman, <i>"Brother, You Can't Go to Jail for What You're Thinking": Motives, Effects, and "Hate Crime" Laws</i> , Crim. Just. Ethics, Summer/Fall 1992, at 24 .....	17
Susan Gellman, <i>Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws</i> , 39 UCLA L. Rev. 333 (1991) .....	34, 36

## STATEMENT OF THE CASE

Respondent Todd Mitchell accepts the facts as outlined by the Wisconsin Supreme Court, with the following additions:

On October 7, 1989, a group of people gathered at the Renault apartment complex in Kenosha, Wisconsin. Todd Mitchell did not join the group until about forty-five minutes later. (R. 56: 80; 65: 5, 116-19, 122). Some had watched the movie "Mississippi Burning" and were discussing it. They particularly noted the part in which a white man hit a black child who was praying. (R. 65: 120-21).

A witness testified that at one point Mr. Mitchell asked "was they hyped up to do something?" (R. 65: 123). On redirect, that witness amended the statement to: "Do you all feel hyped up to move on some white people?" (R. 65: 128). He also testified that Mr. Mitchell said, "There goes a white boy; go get him." (R. 65: 124). As Todd Mitchell stood in the parking lot of the apartment complex, a group of eight to ten young, black males ran across the street and beat a young, white male, Gregory Reddick, who was passing by. Mr. Mitchell never crossed the street during the attack. (R. 56: 71, 76). One of the juveniles stole Mr. Reddick's sneakers. (R. 56: 71; 65: 11-12). Mr. Mitchell then flagged down a police officer and directed him to the injured boy. (R. 56: 71, 76). Two witnesses testified that Mr. Mitchell told them not to go across the street. (R. 65: 17, 176-77). One heard Mr. Mitchell tell some people "they shouldn't be doing that" and "[y]ou guys should leave that boy alone. . . ." (R. 65: 16-17, 19). Mr. Mitchell appeared voluntarily at the police station and talked to police officers. He said that he regretted pointing out Mr. Reddick. (R. 59: 4, 10).

The jury found Mr. Mitchell not guilty of the battery as charged, but found him guilty of a lesser degree of battery, party to the crime, and enhanced under Wis. Stat. Section 939.645 (1989-90), the Wisconsin hate crime law. The trial court sentenced him to the maximum of two years for the battery and added two years under the penalty enhancer. (R.

92; 93; J.A. 30 n.3). The trial court rejected Mr. Mitchell's challenge to the constitutionality of the hate crime law. The Wisconsin Court of Appeals affirmed the trial court's decision. The Wisconsin Supreme Court reversed. The court held that the hate crime law violated the First Amendment directly by punishing thought and indirectly by chilling free speech. (J.A. 33).

### SUMMARY OF THE ARGUMENT

The issue in this case is punishment of thought. Government cannot constitutionally increase penalties for criminal offenses solely because the defendant was motivated by bigoted thoughts and ideas of which government disapproves.

Section 939.645 of the Wisconsin Statutes has been definitively construed by the Wisconsin Supreme Court as enhancing penalty ranges for already punishable criminal conduct on the sole basis that the defendant was motivated by bias on certain state-disapproved subjects. Section 939.645 does not punish conduct *in spite of* effects upon First Amendment rights to freedom of thought, it punishes conduct more severely *because of* the exercise of those First Amendment rights. Bias elements in crimes, including the defendant's speech, may be used as evidence of neutral sentencing factors and of neutral elements of offenses, but this does not mean that bias itself may *be* an element of an offense.

The State asserts interests that it argues justify the statute's distinctions among motives. Some of these asserted interests are so general as to be applicable to virtually any criminal statute. The others refer to effects of bias-motivated conduct that amount to nothing more than the impact of the content and viewpoint of the defendant's thoughts and opinions. This Court has recently stated that such an interest cannot support regulation that draws distinctions on the basis of content and viewpoint, because what makes the harm of a bias crime "unique" is "nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message." *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538,

2548 (1992). The content- and viewpoint-specificity of Section 939.645 is not necessary to serve any of Wisconsin's interests, because those interests may be served by neutral alternatives. Furthermore, Section 939.645 is not narrowly tailored.

Section 939.645 is overbroad. In *R.A.V.*, this Court made clear that even expression that is otherwise constitutionally punishable may not be regulated based on content and viewpoint. Therefore, even if Section 939.645 could constitutionally be applied to crimes involving violent conduct, its applicability to "fighting words" offenses renders the statute overbroad.

Section 939.645 chills speech and association protected by the First Amendment. Although a defendant's speech and associations may be introduced as evidence of other elements of a crime, prosecutions under Section 939.645 must inevitably rely virtually exclusively upon a defendant's speech and associations for proof of the bias motive.

The State fears that if this Court affirms the unconstitutionality of Section 939.645, a variety of existing civil rights laws will be subject to constitutional attack. The State's fears are baseless. The civil rights laws are not before this Court in the present case. Moreover, the civil anti-discrimination laws are readily distinguishable from Section 939.645. Those laws target discriminatory *acts*, such as firing, denial of housing opportunities or denial of access to public accommodations. Section 939.645, on the other hand, specifically targets motive alone.

Even if civil anti-discrimination laws implicated the same First Amendment concerns as Section 939.645, they would withstand strict scrutiny. Any content- or viewpoint-based distinctions that they may draw are necessary to serve compelling state interests. Criminal civil rights statutes are distinguishable because they are necessary to protect the affirmative exercise of specific constitutional and federally protected rights.

In general, anti-discrimination laws deal either with governmental, commercial, or public areas of activity, or with interference with others' exercise of federally protected rights in a manner that interferes so greatly with government action that it may be treated as a usurpation of government power. When a "selection" occurs outside these public or commercial spheres, the law does not recognize it as "discrimination."

Section 939.645 also violates the Equal Protection Clause of the Fourteenth Amendment. The statute treats persons committing the same offenses differently, solely on the basis of the exercise of their fundamental right to free thought and opinion. Section 939.645 fails strict scrutiny because the distinctions it draws are not necessary to serve a compelling state interest.

Finally, Section 939.645 is unconstitutionally vague. It gives no guidance as to its application in mixed motive situations. A subsequent amendment of the statute indicates the Wisconsin legislature's recognition that the pre-amendment statute now before this Court is ambiguous in this regard.

Justice Holmes once wrote, "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought we hate." *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting), *overruled by Girouard v. United States*, 328 U.S. 61 (1946). Some of the greatest moments of this Court have occurred when it came time to put this principle into action. The present case calls for its application once again.

## ARGUMENT

### I. THE WISCONSIN SUPREME COURT CONSTRUED SECTION 939.645 AS PUNISHING MOTIVES.

The Wisconsin Supreme Court's construction of Section 939.645 is binding upon this Court. This Court reviews a

state's highest court's findings of unconstitutionality under the federal Constitution, but does not review the state court's interpretation of its own state's laws. *R.A.V.*, 112 S. Ct. at 2542. The Wisconsin Supreme Court construed Section 939.645 as creating enhanced penalties for existing crimes on the basis of the offender's motive, when that motive relates to a specified list of subjects.

The Wisconsin Supreme Court stated repeatedly and unequivocally that both the intent and effect of Section 939.645 was punishment of motives, and only those motives involving certain subjects and viewpoints. "The hate crime statute does not punish the underlying criminal act, it punishes the defendant's motive for acting. . . . [I]t is clear that sec. 939.645, Stats., is expressly aimed at the bigoted bias of the actor." *State v. Mitchell*, 485 N.W.2d 807, 812, 813 (Wis. 1992); (J.A. 37); *see generally id.* at 811-14. The violent or harassing conduct is already punished by the underlying offense. In fact, guilt of the conduct and of the motive must be found separately. The jury returns a special verdict on the latter. Wis. Stat. Section 939.645(3).

The court rejected the State's assertion that "the statute punishes only the 'conduct' of intentional selection of a victim," because virtually every crime includes intentional selection of a victim. As construed by the Wisconsin Supreme Court, Section 939.645 punishes only "the 'because of' aspect of the selection, the *reason* the defendant selected the victim, the *motive* behind the selection." *Id.* at 812; (J.A. 35).

The Wisconsin Supreme Court's construction of Section 939.645 sets the parameters for this Court's constitutionality analysis. That court's interpretation of the statute as punishing motive is the starting point for the strict scrutiny of the statute under the First Amendment and the Equal Protection Clause, and for Mr. Mitchell's overbreadth and vagueness challenges.

**II. SECTION 939.645 PUNISHES OFFENDERS' THOUGHTS BY SINGLING OUT FOR EXTRA PUNISHMENT CERTAIN MOTIVES ON THE BASIS OF THEIR CONTENT AND VIEWPOINT, IN VIOLATION OF THE FIRST AMENDMENT.**

**A. SECTION 939.645 PUNISHES BIGOTED THOUGHT AND IS THEREFORE SUBJECT TO STRICT SCRUTINY.**

1. Section 939.645 imposes greater penalties solely on the basis of the content and viewpoint of the offender's motive.

Justice Black, in his famous dissent in *Beauharnais v. Illinois*, 343 U.S. 250, 274 (1952), recognized the dangers of sacrificing liberty for a laudable goal:

The motives behind the state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of "witches."

Section 939.645 punishes thought. It enhances penalties based upon the defendant's motives when those motives represent a viewpoint or belief on certain enumerated subjects. Although those viewpoints and beliefs are widely considered reprehensible, the First Amendment does not allow Wisconsin to express its disapproval by punishing them.

Accordingly, the Wisconsin Supreme Court held Section 939.645 unconstitutional. "[T]he hate crimes statute punishes bigoted thought . . . [It] does not punish the underlying criminal act, it punishes the defendant's motive for acting. . . . [It] creates nothing more than a thought crime." *Mitchell*, 485 N.W.2d at 812, 817 n.21; (J.A. 34, 47 n.21). In striking down a similar law, the Supreme Court of Ohio reached the same conclusion:

The predicate offenses . . . are already punishable acts under other statutes. Thus the enhanced penalty must be for something more than the elements that constitute the predicate offense. Our analysis begins with the identification of the "something more" that is punished under R.C. 2927.12,

but which is not an element of the underlying offense. R.C. 2927.12 adds only that the violation of one of the predicate statutes be "by reason of the race, color, religion, or national origin of another person or group of persons." (Emphasis added). The statute specifies no additional act or conduct beyond what is required to obtain a conviction under the predicate statutes.

\* \* \*

R.C. 2927.12 specifically punishes motive, and motive alone, not action or expression. The Ohio statute singles out racial and religious hatred as a viewpoint to be punished. It is the regulation of viewpoint that most particularly violates the Ohio and federal Constitutions.

. . . [W]e find that the effect of R.C. 2927.12 is to create a "thought crime."

*State v. Wyant*, 597 N.E.2d 450, 453 (Ohio 1992) (footnote omitted).

Motive consists entirely of the defendant's thoughts and beliefs. The First Amendment shields thoughts and beliefs from punishment. *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977); *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977). Certainly the State could not punish these thoughts and beliefs independently. That they are held by one who commits a crime "because of" them does not remove the constitutional shield. Yet, that is exactly what the statute seeks to do. Mr. Mitchell makes no claim that the constitutional protection of his thoughts protects his actions from punishment. However, the State's power to punish Mr. Mitchell's actions does not remove the constitutional barrier to punishing his thoughts.

The State attempts to distinguish this Court's recent opinion in *R.A.V.* on the ground that *R.A.V.* dealt with "speech," albeit "unprotected" speech, and this case deals with "conduct." Contrary to the State's position, the principle underlying *R.A.V.* applies with equal force to Section 939.645. Government may not punish viewpoint and belief, even when they are associated with punishable acts. Whether those acts are speech or nonspeech is irrelevant.

In *R.A.V.*, this Court held that even racist "fighting words," although "unprotected" speech, may not be treated more severely than other fighting words on the basis of their content or viewpoint. The same is true, said this Court, for "expressive conduct": "We have long held . . . that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses. . . ." 112 S. Ct. at 2544. See also *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310, 314-17 (1990); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505 (1969).

Government may not punish or regulate "pure speech" because of its disapproval of the ideas expressed. *R.A.V.*, 112 S. Ct. at 2542. See also *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991). The same principle logically applies to conduct, even criminal conduct. It may not be punished more severely solely because it carries a government-disapproved message or because of the content or viewpoint of the actor's thoughts. Thus, this Court's decision in *R.A.V.* is not distinguishable on the ground that the ordinance at issue in *R.A.V.* dealt with "speech" as opposed to "conduct."<sup>1</sup>

Similarly, the area of disagreement between the *R.A.V.* majority and the Justice White concurrence, whether strict scrutiny is ever applicable in traditionally "unprotected" categories, is not at issue in the present case. Even under Justice White's view of the categorical approach, a law punishing thought and belief, as Section 939.645 does, is subject to strict scrutiny. The entire taxonomy of "pure speech," "unprotected speech," "expressive conduct," and "pure conduct" is simply not at issue here, because the State's power to punish the underlying acts, whether "conduct" or "speech," is

<sup>1</sup> Indeed, while the St. Paul ordinance in *R.A.V.* was construed to reach only punishable speech, the defendant in that case had engaged in the conduct of burning a cross; in the present case, wherein the State argues that the statute reaches only pure conduct, the defendant's action consisted entirely of punishable speech.

not disputed, despite any incidental impact on First Amendment rights.

Strict scrutiny is not invoked by the character of the underlying acts, but by the protected character of the single factor triggering the imposition of the *additional* punishment: a bigoted motive. The defendant's disfavored thoughts and beliefs are unquestionably within a protected category under the First Amendment, even when the defendant has also committed a crime. The question, therefore, is not how speech may be treated differently from conduct, or "protected speech" differently from "unprotected speech," or "expressive conduct" differently from "nonexpressive conduct."

Rather, the threshold question is this: within *any* of these categories, may bigoted motive be separately punished, in addition to the punishment for the underlying act? Even in a completely regulable category, not every possible added factor would be constitutionally punishable. For example, in punishing theft, the state may increase penalties based upon the value of the property stolen or use of a dangerous weapon, but not based upon the race or political affiliation of the defendant or the social prominence of the victim.

Some "pure speech" can be treated differently from other "pure speech" based upon factors such as time, place, and manner, but not based upon its content or viewpoint. *R.A.V.*, 112 S. Ct. at 2544-45; *Simon & Schuster*; *Collin v. Smith*, 578 F.2d 1197, 1201-02 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). Some "unprotected speech" may be treated differently from other "unprotected speech" based upon secondary effects, *R.A.V.*, 112 S. Ct. at 2546-47, 2549, but not because of its content and viewpoint. Some "expressive conduct" may be treated differently from other "expressive conduct" because of its "non-communicative aspect," *United States v. O'Brien*, 391 U.S. 367, 376 (1968), but not because of its content and viewpoint. *Texas v. Johnson*; *United States v. Eichman*, 496 U.S. at 315-17. By the same token, government may not treat even otherwise punishable conduct differently from other punishable conduct solely because of its content

and viewpoint – not because the conduct is protected by the First Amendment, but because the content and viewpoint are.

This Court has always recognized that freedom of speech necessarily presupposes and includes the freedom to think, to believe, and to disagree. *See, e.g., Wooley v. Maynard*, 430 U.S. at 705; *Abood v. Detroit Bd. of Educ.*, 431 U.S. at 234-35 (“[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the state.”). *See also* Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, *Crim. Just. Ethics*, Summer/Fall 1992, at 29.

Section 939.645 adds years to criminal sentences based upon the content of the offender’s thoughts and beliefs. Only the State’s disfavored topics of race, religion, color, disability, sexual orientation, national origin, or ancestry trigger the statute’s operation. The First Amendment does not permit government to impose special prohibitions based on disfavored subjects. *R.A.V.*, 112 S. Ct. at 2547; *Simon & Schuster*, 112 S. Ct. at 509. The State could not enact a penalty enhancer that applies whenever an offender is motivated by his viewpoint on abortion or his opposition to United States foreign policy.

Like the ordinance struck down in *R.A.V.*, Section 939.645 “goes beyond mere content discrimination, to actual viewpoint discrimination.” *Id.* *See also Wyant*, 597 N.E.2d at 213. Wisconsin incorrectly contends that the law is not even content-based, let alone viewpoint-based, because “[t]he Wisconsin law does not single out any belief or type of message a criminal might communicate by his or her crime.” *Brf. Pet.* at 38. Elsewhere, though, the State acknowledges that the statute is both content- and viewpoint-based by declaring that the statute is directed toward “bias-motivated action” and “racist attack[s].” *Petition for Certiorari* at 16, 18. In the Wisconsin Supreme Court, the State “admit[ted] that this case involves legislation that seeks to address bias related crime.” *Mitchell*, 485 N.W.2d at 814; (J.A. 40).

The State further admits the statute’s content and viewpoint specificity by asserting that its interest is in punishing offenses that spread “fear,” “distrust,” and “resentment.” *Brf. Pet.* at 27. In *R.A.V.*, this Court found that nearly identical language bespoke content and viewpoint specificity. 112 S. Ct. at 2548. In *R.A.V.*, the Supreme Court of Minnesota had held that the St. Paul ordinance was directed at “group hatred.” *Id.* at 2548. In the present case, the Supreme Court of Wisconsin held that the aim of Section 939.645 was the same: “The ideological content of the thought targeted by the hate crimes statute is identical to that targeted by the St. Paul ordinance.” *Mitchell*, 485 N.W.2d at 815; (J.A. 42). In *Wyant*, the Supreme Court of Ohio observed: “If the legislature can enhance a penalty for crimes committed ‘by reason of’ racial bigotry, why not ‘by reason of’ opposition to abortion, war, the elderly (or any other political or moral viewpoint)?” 597 N.E.2d at 457.

## 2. Motive is distinct from intent and purpose.

Criminal statutes commonly employ the mental element of “intent” or “purpose.” The Wisconsin Supreme Court’s distinction of intent and purpose from motive has long been recognized as significant in criminal law. The court’s explanation, 485 N.W.2d at 813 n.11; (J.A. 37), is virtually identical to that set forth in the federal jury instructions:

Intent and motive are different concepts and should never be confused. Motive is what prompts a person to act or fail to act. Intent refers only to the state of mind with which the act is done or omitted.

\* \* \*

The motive of the defendant is, therefore, immaterial except insofar as evidence of motive may aid in the determination of state of mind or the intent of the defendant.

1 Edward J. Devitt et al., *Federal Jury Practice and Instructions*, Section 17.06 (4th ed. 1992). *See also* Martin B. Margulies, *Intent, Motive, and the R.A.V. Decision*, *Crim. Just. Ethics*, Summer/Fall 1992, at 42.

The criminal law is appropriately concerned with intent, because intent measures an actor's culpability based on volition. It determines whether an offender's crime resulted from conscious choice, recklessness, or inadvertence. Because intent measures culpability, differences in punishment based on intent are appropriate. Motive, by contrast, does not affect *mens rea*; one may act purposefully, knowingly, recklessly, or negligently, all with the same motive or with none. The *Wyant* court observed that "one can have motive without intent, or intent without motive. For instance, the wife of a wealthy but disabled man might have a motive to kill him, and yet never intend to do so. A psychopath, [sic] on the other hand, may intend to kill but have no motive." 597 N.E.2d at 454.

Intent and purpose affect the "what" of conduct. Motive is the "why" of conduct. Motive is nothing other than the thoughts and beliefs prompting the offender to act. Although motive often plays a part in criminal trials, it is not an element itself, but is used as evidence of other neutral elements such as identity and intent.

The State argues that other motives are criminalized, and therefore the motives singled out by Section 939.645 may be, too. The State's examples, however, do not support its position. The first, penalty enhancement for batteries against police officers, does not depend upon motive (or, for that matter, any other possible definition of "intentional selection" of victims "because of" their status as police). The offender could be unaware that the victim is an officer; or know it, regret it, and proceed *in spite of* that fact; the enhancement would still apply.

The State's other example, murder for hire as a death penalty specification, is also inapposite. The State cites to *Jurek v. Texas*, 428 U.S. 262 (1976), which was about the general constitutionality of a capital sentencing procedure that included murder for hire as a statutory aggravating circumstance. That procedure did not authorize the death penalty "if an offender was motivated by the desire for money," as paraphrased by the State. The actual language was: "the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder

for remuneration or the promise of remuneration." *Id.* at 265 n.1 (emphasis added). The aggravating factor applies equally to the one who hires the killer. This person is not motivated by a desire for money. The Texas statute at issue in *Jurek*, like those of many other states, does not turn on motive, but on the objective act of formation of a contract to murder. As the Ohio Supreme Court recognized in *Wyant*, "[t]he greater punishment is for the additional act of hiring or being hired to kill. The motive for the crime (such as jealousy, greed or vengeance) is not punished." 597 N.E.2d at 455.

In any case, even if government could constitutionally punish some motives, Section 939.645 would still be unconstitutional, because it punishes motives on a content- and viewpoint-specific basis. "Pecuniary gain," for example, even if viewed as a motive rather than a purpose, does not implicate the defendant's opinions or beliefs. Revenge, fear, greed, necessity and self-defense similarly implicate no First Amendment concerns. Bigotry, by contrast, while reprehensible, is doubtless a viewpoint on a political and social issue. "[W]hen the motive's kernel is exposed, and it reveals a political or social belief system that we are compelled to tolerate, then . . . [government] may not make such a belief the essence of a crime." Ralph S. Brown, *Susan Gellman Has It Right*, *Crim. Just. Ethics*, Summer/Fall 1992, at 46, 47.

In *R.A.V.*, this Court invalidated the St. Paul ordinance because it punished offenders specifically because their conduct "contain[ed] messages of bias-motivated hatred." 112 S. Ct. at 2548. Thus the ordinance discriminated on the basis of viewpoint.

### 3. Section 939.645 is not within the rule of *United States v. O'Brien*.

In *United States v. O'Brien*, 391 U.S. 367 (1968), this Court upheld David O'Brien's conviction for destroying his draft card, despite the incidental impact on his freedom of expression. The government's interest in insuring the efficient functioning of the Selective Service System was unrelated to

the suppression of belief or expression. By contrast, Wisconsin is not regulating conduct *despite* its expressive elements, but punishing already proscribed conduct more severely *because* of its expressive elements. This is precisely the result forbidden by the First Amendment.

Indeed, even in reversing the appellate court's decision in *O'Brien*, this Court stressed that the statutory provision at issue prohibited the willful destruction of draft cards

and does nothing more. In other words, both the governmental interest and the operation of the [law] are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, *and for nothing else*, he was convicted.

391 U.S. at 381-82 (emphasis added). See also *United States v. Lemon*, 723 F.2d 922, 937-38 & n.46 (D.C. Cir. 1983).

David O'Brien could not have received additional penalties for having violated the statute "because of" his opposition to the Vietnam War.<sup>2</sup> *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2463 (1991). See also *Wayte v. United States*, 470 U.S. 598, 610 (1985). For this reason, Wisconsin's attempt to analogize its hate crime enhancement law to the draft card destruction law in *O'Brien* is flawed. The proper analogy would compare hate crime enhancement to a law which punished draft card destruction but increased the penalties when

<sup>2</sup> It is noteworthy that the statutory amendment upheld in *O'Brien* did not create greater penalties for wilful destruction of a draft card than for the already prohibited acts of forgery or alteration of a draft card. See *O'Brien*, 391 U.S. at 387 (Appendix to opinion). This differs from Section 939.645, which greatly increases the potential penalties for offenses when a bias motive exists.

the burning was motivated by opposition to government policies.

This Court recently adhered to this reasoning even while upholding a statute under the First Amendment. In *Barnes v. Glen Theatre*, the challenged statute survived only because it treated expressive and nonexpressive nudity exactly alike. The statute did not specifically ban nude dancing: "Public nudity is the evil the state seeks to punish, *whether or not* it is combined with expressive activity." 111 S. Ct. at 2463 (emphasis added). Justice Scalia, concurring, stressed that:

Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional. . . . As we clearly expressed the point in *Johnson*: "The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements."

*Id.* at 2466 (quoting *Texas v. Johnson* at 406).

In Section 939.645, by contrast, the governmental interest and the operation of the law are not limited to the "non-communicative aspect" of the defendant's conduct. That noncommunicative aspect is what is already punished by the underlying criminal statutes. Section 939.645 is directed toward the "communicative impact" of the crime. Although the State claims that its interest is in punishing the effects of these offenses, Section 939.645 does not punish effects. Rather, it punishes the defendant for the communicative impact of his bigoted thoughts, or, even worse, for simply having had those thoughts. If the bigoted motive is in no way communicated to the victim or others, then Wisconsin's asserted interest is not served by punishing it.

Mr. Mitchell does not argue, as did Mr. O'Brien, that his thoughts and the expressive elements of his actions shield his otherwise punishable conduct from prosecution under the battery statute. He contends only that his thoughts and expression may not be used to subject him to an additional punishment. Moreover, the tail surely wags the dog here: under Section 939.645, Mr. Mitchell was subject to three and one

half times the maximum penalty he could have received for the same battery committed "because of" some other motive.

**4. *Dawson v. Delaware* and *Barclay v. Florida* do not stand for the proposition that bigoted motive may be an element of a criminal offense.**

The State erroneously relies on *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), and *Barclay v. Florida*, 463 U.S. 939 (1983). The State reasons that since racist motivation is a factor that may properly be considered at sentencing, it follows that racist motive may properly be the subject of a penalty enhancer. The State's logic is flawed in two respects. First, the State misreads *Dawson* and *Barclay*, and second, the State fails to recognize the fundamental difference between considering a factor in the context of sentencing and separately punishing it by making it the subject of a penalty enhancer.

In *Dawson* and *Barclay*, this Court simply clarified that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing," where that evidence might be relevant in proving *other*, content-neutral factors. For example, a sentencing judge could consider beliefs which demonstrate the defendant's lack of remorse, the effects on victims, risk of death to many people, or that the offense was committed "in a particularly cruel and heinous manner." *Dawson*, 112 S. Ct. at 1097, 1098. In sentencing, these effects must be shown actually to have occurred in the individual case. Bias motive cannot be used as a per se surrogate for the effects, as it is in Section 939.645. *Dawson* and *Barclay* do not say that a statute that would require enhanced penalties on the basis of motive would be constitutional, nor do these decisions support the proposition that an offender's bigoted motive may, all alone, be used to automatically convert a misdemeanor to a

felony, subjecting the offender to several years in prison and all of the other consequences a felony conviction entails.<sup>3</sup>

A judge deciding what sentence to impose within a penalty range already set by the legislature has broad discretion to consider a wide range of relevant material. *Dawson*, 112 S. Ct. at 1097. However, it does not follow that any factor that a sentencing judge may consider may be singled out as the subject of a penalty enhancer that automatically exposes the offender to a substantial increase in the potential penalty.

For example, a sentencing judge may consider such factors as "education," "home and neighborhood," "employment," and "religion." *Williams v. New York*, 337 U.S. 250, n.15 (1949). The fact that an offender has only a fourth grade education, is unemployed, or lives in a poor neighborhood may indicate that the offender will be unable to secure gainful employment and is likely to commit future crimes. However, the State could not enact a penalty enhancer that is triggered whenever the offender is poorly educated, unemployed, or lives in a certain neighborhood. Similarly, while an offender's religious background may be relevant to remorse or likelihood of rehabilitation, a state may not enact a penalty enhancer that permits a longer sentence whenever the offender is an atheist.

It has long been accepted, and Mr. Mitchell does not dispute, that First Amendment-protected activity may be introduced as evidence of neutral elements, even at the guilt phase. However, this Court did not expand upon this principle in either *Dawson* or *Barclay* to say that the defendant's racial motive could itself be a sentencing factor, much less an element of a punishable offense. See Susan Gellman, "*Brother, You Can't Go to Jail for What You're Thinking*":

<sup>3</sup> By converting Class A misdemeanors to felonies, the hate crime law does far more than enlarge the discretion of the sentencing judge. In Wisconsin, conviction of a felony carries substantial collateral consequences, including loss of the right to vote and other civil rights. See Wis. Const. art. XIII, section 2.

*Motives, Effects, and "Hate Crime" Laws*, Crim. Just. Ethics, Summer/Fall 1992, at 24, 25-26. In fact, the *Dawson* dissent characterized the majority's opinion as holding that "the First Amendment *limits* the aspects of a defendant's character that [sentencing courts and juries] may consider." 112 S. Ct. at 1104 (Thomas, J., dissenting) (emphasis added). As both *Dawson* and *Barclay* make clear, even the introduction of a defendant's bigotry as evidence of a content-neutral sentencing factor must be undertaken only with utmost caution and under very limited circumstances.

*Dawson* and *Barclay* allow a sentencing court to consider any motive relevant to content-neutral sentencing factors. Section 939.645, by contrast, creates an irrebuttable presumption that only those motives targeted by the statute could ever create the extra harm that warrants the increased penalty range. Thus, a Wisconsin judge, sentencing a batterer, would be able to consider the extra effects caused by the defendant's having selected the victim on the basis of any status, but if the status were sex, poverty, seeking an abortion, or anything else not listed in Section 939.645, the judge would be limited to a two year maximum for battery.

## B. THE HATE CRIME LAW DOES NOT SURVIVE STRICT SCRUTINY.

If a statute which facially proscribes thought based on content or viewpoint can ever be constitutional, it must survive strict scrutiny. *Simon & Schuster*, 112 S. Ct. at 509.<sup>4</sup> Under the strict scrutiny standard, the law can only be upheld if its content-and viewpoint-specificity is necessary and narrowly tailored to serve a compelling state interest.

<sup>4</sup> Justice Kennedy, concurring in *Simon & Schuster*, noted that strict scrutiny is traditionally part of equal protection and not First Amendment jurisprudence, and that content-based regulations of speech are not permissible, even if they could survive strict scrutiny. 112 S. Ct. at 512.

## 1. Wisconsin's asserted state interests do not justify a content- and viewpoint-specific statute.

The State sets forth several interests that it contends justify the punishment of motive in Section 939.645. Most of these purported interests are being raised for the first time before this Court, raising the question whether they are, in fact, the State's true interests supporting the statute. The first two interests the State sets forth, retribution and deterrence, are so general that they can be asserted with equal force to justify any criminal statute. If the State's desire to punish and deter crime were a sufficient interest to overcome strict scrutiny, then any criminal law would survive, including the ordinance at issue in *R.A.V.* The State's retribution argument simply reasserts that government can constitutionally proclaim some motives more "depraved" than others, solely on the basis of their content and viewpoint on certain subjects. The First Amendment prohibits government from making such distinctions. See *R.A.V.*, 112 S. Ct. at 2547-48.

The State asserts that "violations that occur with increasing frequency merit penalties with a greater deterrent effect," and assumes that "[t]here is no serious dispute that discrimination crimes are occurring with greater frequency." Brf. Pet. at 23. However, the statistics do not support the State's assumption. The most recent audit by the Anti-Defamation League ("ADL") reports that nationally anti-Semitic incidents decreased by 8% in the last year. ADL, *1992 Audit of Anti-Semitic Incidents*, 3 (1992) (hereinafter "ADL 1992 Audit").

The ADL 1992 audit reveals that there was, at best, no correlation between laws similar to Section 939.645 and decrease in anti-Semitic incidents from 1991 to 1992. Indeed, states without such laws did somewhat better. Of states with these laws, 38% reported an increase in anti-Semitic vandalism, 45% reported a decrease, and 17% had no change. Of states without these laws, 30% reported an increase, 48% reported a decrease, and 22% had no change. *Id.* at 10-11, 42, 44, 45.

Data compiled by the State of Wisconsin Sentencing Commission reveals that there were only four felony convictions under the hate crimes law from January 1, 1987 through December 31, 1991. Two of those convicted were Todd Mitchell and his brother Jermaine, who were involved in the incident underlying this case.<sup>5</sup>

The FBI released statistics pursuant to the Hate Crimes Statistics Act of 1990 for the first time on February 4, 1993.<sup>6</sup> The data were supplied by 2,771 law enforcement agencies in 32 states. "Hate crime occurrences" were reported in only 27% of the jurisdictions. Wisconsin, with 303 participating agencies, the highest number next to New York, reported 41 incidents, a low number among reporting states. This number did not reflect arrests, charges, or convictions, but only reported occurrences, mostly of graffiti or minor vandalism. Thus, contrary to the State's assertions, the available data suggest that hate crimes occur infrequently in Wisconsin.

Similarly, Wisconsin asserts that such crimes "are more likely than other crimes to provoke further crime in the form of retaliatory crime or copycat crimes." Brf. Pet. at 24. However, "responsive violence fears" cannot support content- and viewpoint-based restrictions. *Collin v. Smith*, 578 F.2d at 1203. Motives, like all First Amendment activity, cannot be regulated on the basis of conclusory and speculative assertions of possible future harm. *Brandenburg v. Ohio*, 395 U.S. 447 (1969); *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395 (1992). Even statistical evidence of the likelihood of that harm actually occurring does not permit regulation on the basis of content: pornography and even the Super Bowl have been statistically correlated to increases in violence against women, but that cannot justify their prohibition or punishment. *Hudnut v. American Booksellers Ass'n*, 771 F.2d 323, 329 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *Super Bowl Sunday: A Day for Fans, Food, Fun - And Domestic Violence*,

<sup>5</sup> A copy of these unpublished data has been filed with the Court.

<sup>6</sup> A copy of the FBI news release containing these statistics has been filed with the Court.

Chi. Trib., Jan. 29, 1993, at 2. Moreover, even if it could be reasonably assumed that crimes motivated by bias are more provocative than crimes motivated by greed or need, it cannot be presumed that crimes motivated by the subjects enumerated in Section 939.645 are more provocative of retaliation or imitation than crimes motivated by politics, gender, abortion, environmental concerns, or antiwar sentiment.

Likewise, the State asserts that hate crime offenders "are generally more likely than other offenders to pose a danger of repeat criminal behavior" and "are less likely than most offenders to feel true remorse." Brf. Pet. at 24 and 25. The State's interest in recognizing future dangerousness and lack of remorse in offenders under Section 939.645 is no greater than the same interest with regard to offenders who selected their victims "because of" other reasons such as politics, gender, or abortion. It is reasonable to assume, in fact, that the defendants in *O'Brien*, *Johnson*, *Eichman*, and *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), all of whom deliberately acted to make public statements, would be at least as likely as Todd Mitchell to engage in similar conduct again and to feel no remorse for their actions.

The final interest claimed by the State, prevention and redress of the assertedly unique effects of bias crimes on victims and others of their "targeted groups," is the interest it asserted in the courts below. The State asserts that this unique harm consists of causing "members of the targeted group [to] feel a loss of security," and creating "fear and terror" in the victim. Brf. Pet. at 25, 26. These effects occur with almost every crime. When they occur as a result of an offense under Section 939.645, as this Court recognized in *R.A.V.*, the additional harm consists of the impact of the defendant's beliefs, and the offensiveness of their communication. This harm may well be both real and significant, but the beliefs and their communication are still squarely within the protection of the First Amendment. See 112 S. Ct. at 2548. Thus, even if the injuries suffered by the victim or others from violations of Section 939.645 are "qualitatively different" from the injuries caused by crimes with other motives, the essence of that qualitative difference is something that the government has no power to punish.

In *Collin v. Smith*, the Seventh Circuit rejected the same argument that Wisconsin makes here. The Village of Skokie argued that its challenged ordinances were justified by "a substantive evil that it has a right to prohibit: the infliction of psychic trauma on resident holocaust survivors and other Jewish residents." 578 F.2d at 1205. Although the court did not deny the reality of the problem, it rejected Skokie's argument:

[A]ny shock effect . . . must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.

*Id.* at 1206. Although the *Collin* decision dealt only with "a silent march, attended only by symbols and not by extrinsic conduct offensive in itself," 578 F.2d at 1206,<sup>7</sup> the same principle applies to Section 939.645. Indeed, if government can point to the harmful effects of "a distinctive idea" as a compelling state interest justifying punishment of motives, there is no reason it could not point to those same harmful effects to justify punishing not only Nazi marches, but bigoted books, speeches, and associations as well. A Nazi demonstration in Skokie or distribution of *Mein Kampf* would have effects at least as terrifying and widespread as would a battery in which the victim was selected "because of" being Jewish.

*The Satanic Verses* causes "special harms" that *Moby Dick* does not; "The Last Temptation of Christ" spread resentment that "E.T." did not; Robert Mapplethorpe's art is more "depraved" than Norman Rockwell's; a speech by Louis Farrakhan is more likely to provoke retaliation than a speech by Bill Cosby. The State has the same compelling interest in redressing the same "special harm" regardless of how it is caused. The State may not constitutionally enact a law stating that "No person shall publish a book that he knows or should

<sup>7</sup> Note, however, that *Street v. New York*, 394 U.S. 576 (1969), from which the court took its "shock effect" language, was a flag-burning case.

know is likely to create the same types of harms as are created by a violation of Section 939.645." Although the State's interest would be identical to the interest it asserts here, it could not treat bigoted books differently than other books. Such a law cannot survive strict scrutiny simply because bigoted books create special harms. Similarly, Section 939.645 cannot survive strict scrutiny simply because bigoted crimes create special harms.

In *Texas v. Johnson*, the State of Texas asserted a similar compelling state interest in preventing the special harm created by flag burning, not created by other unlawful burnings, to justify its flag-burning statute. This Court summarized that interest as "a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis." 491 U.S. at 408. This Court rejected that argument:

Our precedents do not countenance such a presumption. . . . It would be odd indeed to conclude *both* that "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection," *and* that the Government may ban the expression of certain disagreeable ideas on the unsupported assumption that their very disagreeableness will provoke violence.

*Id.* at 408-09. Similarly, in *R.A.V.*, this Court stated that tendency to provoke a violent response "would not justify selective regulation under a 'secondary effects' theory. The only reason why such expressive conduct would be especially correlated with violence is that it conveys a particularly odious message." 112 S. Ct. at 2549, n.7.

In both *Texas v. Johnson* and *United States v. Eichman*, this Court recognized that politically motivated flag burnings can create a distinct type of harm that otherwise motivated flag burnings (such as the respectful burning of an irreparably damaged flag) do not. However, that harm consists of "serious offense to others"; the flag burning statute was "aimed at protecting onlookers from being offended by the ideas expressed by the prohibited activity." *Texas v. Johnson*, 491

U.S. at 411, 412 n. 7. The flaw in this asserted justification is not that the harm is not real, unique, and serious; indeed, as in the present case, the impact of antisocial sentiments may be very significant. Rather, it is the *nature* of this special harm: "[t]he emotive impact of speech on its audience is not a 'secondary effect' . . . that would justify the statute. *Id.* at 412 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)). See also *R.A.V.*, 112 S. Ct. at 2549. Even the statute at issue in *Eichman*, which purported to proscribe conduct "without regard to the actor's motive," 110 S. Ct. at 2408, was unconstitutionally viewpoint-specific, because it "unmistakably connotes disrespectful treatment of the flag." *Id.* at 2409.

**2. The content and viewpoint specificity of Section 939.645 is not necessary to serve a compelling state interest.**

Wisconsin has completely avoided the dispositive step of the strict scrutiny analysis. The government may assert the most compelling of interests for a content- and viewpoint-based statute, but if it cannot show that the content and viewpoint specificity is *necessary* to serve those interests, then the statute is unconstitutional. *R.A.V.*, 112 S. Ct. at 2549-50. Even if Section 939.645 can be said to serve the State's asserted interests, the State offers no explanation why the hate crime law's focus on particular motives is necessary to do so, or why a neutral statute would not be adequate.

The State has at its disposal a variety of neutral approaches that would serve its asserted interests at least as well as does Section 939.645. The underlying criminal statutes already do exactly that. By definition, every act punished by Section 939.645 is already punished without respect to motive by other sections of Wisconsin's criminal code. Just as in *R.A.V.*, "[a]n ordinance not limited to the favored topics would have precisely the same beneficial effect." 112 S. Ct. at 2550.

Where, as here, the punishable conduct is already a criminal offense and the only effect of the content-based enhancer is to increase the potential penalty, the State must show that the existing range of penalties is inadequate and

cannot be made adequate by a content-neutral enhancer. The State has not attempted nor could it make such a showing. If existing maximums are inadequate, a simple content-neutral solution would be to increase the maximum penalties wherever necessary. That the State, instead, chose to enact a content-based enhancer aimed specifically at bigoted thought makes clear that the real but unspoken purpose behind Section 939.645 is to express the State's hostility to particular forms of bigotry by criminalizing them.

Furthermore, when crimes are motivated by bias, that motivation can be considered without laws such as Section 939.645. Bias motives may be used in sentencing when probative of a content-neutral factor to show that some extra harm or circumstance actually existed in that particular case. It is not used as a per se surrogate for an effect that could possibly have resulted. At the guilt phase, too, bias elements may be introduced as evidence if relevant to other issues. In the present case, had Todd Mitchell been tried for battery alone, without Section 939.645, his words and even his motives could all have been admissible on issues of identity and intent, and could even have provided the deciding weight for his conviction for battery.

Even if penalty enhancement is necessary to redress the asserted special effects of bias-related crimes, it is still not necessary that the statute turn on the content and viewpoint of the defendant's motives. Neither on its face nor as construed by the Wisconsin Supreme Court does the statute say anything at all about effects. It punishes only motive, irrespective of effects. The content- and viewpoint-specific approach of Section 939.645 is simply unnecessary, because many neutral enhancement factors that would serve the same state interests are available to the State. For example, penalties could be enhanced where:

1. The offender acted with the specific intent to create (or with knowledge that he was likely to create) terror within a definable community.
2. The offender acted with specific intent to create (or with knowledge that he was likely to create) a threat of further crime.

3. The offender knew or should have known that a victim was particularly susceptible to the criminal conduct. *Cf.* U.S.S.G. sec. 3A1.1.
4. The offender, in the commission of the offense, intended to inflict serious emotional distress.
5. The commission of the offense created serious psychological harm (comparable to "serious physical harm" specifications that enhance penalties).

Each of these formulas is content-neutral and viewpoint-neutral, and each alone or in conjunction with others would reach all the conduct contemplated by Section 939.645.<sup>8</sup> In fact, the federal sentencing guideline upon which the third example above is based has been used to enhance the penalty for a cross-burning offense. *United States v. Skillman*, 922 F.2d 1370, 1377-78 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 353 (1991).

Justice White, concurring in *R.A.V.*, was concerned that the *R.A.V.* majority's analysis would require an approach that ultimately would restrict *more* First Amendment activity. That concern is not raised by the neutral alternatives suggested here. Conscientious enforcement of Wisconsin's criminal code as it stands would add no new restrictions on more motives. The neutral enhancement factors outlined above do not create new "speech crimes."

---

<sup>8</sup> Neutral approaches such as these would not reach cases in which the additional harm consisted entirely of offensiveness or expression of racist belief that could persuade others to be racist. However, Section 939.645 would be unconstitutional as applied to such cases anyway, as offensiveness that does not rise to the level of fighting words is protected by the First Amendment, and certainly expression of ideas that could persuade others is.

Indeed, not only would neutral approaches such as these examples be at least as effective as Section 939.645 in reaching its stated goals, they could also increase penalties for other particularly harmful conduct as well. Drive-by shootings, clinic bombings, poisonings of painkillers, planting of computer viruses, stalkings, and gang violence could all be subject to penalty enhancement under these examples.

The existence of facially neutral alternatives confirms the unconstitutionality of Section 939.645, just as it did the ordinance at issue in *R.A.V.*: "The existence of adequate content-neutral alternatives thus 'undercut[s] significantly' any defense of such a statute, casting considerable doubt on the government's protestations that 'the asserted justification is in fact an accurate description of the purpose and effect of the statute.'" 112 S. Ct. at 2550 (citation omitted, alteration in original). The State's insistence upon a statute focusing upon motive rather than effect, and only upon motives relating to certain biases, suggests that Wisconsin, like St. Paul, has another interest, unstated and improper: punishing selected bigotries. As this Court put it in *R.A.V.*, "In fact the only interest distinctively served by the content limitation is that of displaying the [government's] special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids." *Id.* (footnote omitted).

### 3. Section 939.645 is not narrowly tailored.

A statute that implicates First Amendment concerns must be narrowly tailored to serve a compelling state interest. *See Simon & Schuster*, 112 S. Ct. at 511. Even assuming that Section 939.645 could be said to serve a compelling state interest, the statute would nonetheless fail strict scrutiny because it is "significantly overinclusive." *Id.* at 511. Like the "Son of Sam" law that was so overinclusive as to be applicable to the works of Henry David Thoreau and Saint Augustine, Section 939.645 reaches a wide range of situations that do not implicate any of the State's asserted compelling interests.

The hate crime law is overinclusive in that it may apply to offenses in which bigotry is only a small fraction of the motive. Although the State points out, "[i]t is one thing to batter someone who provokes you in some manner. It is quite different to single out and batter a person walking down the street *for no other reason* than contempt for the color of his skin," Brf. Pet. at 17 (emphasis added), it is not clear whether the version of Section 939.645 under which Mr. Mitchell was

convicted requires that the prohibited motive be the sole reason for the selection of the victim, a substantial reason or a minute part of the reason. If the amendment that changed the triggering language in the statute from "because of" to "in whole or in part because of" was intended to clarify the original statutory language, the overinclusiveness of the statute is particularly pronounced.<sup>9</sup>

Mixed motive situations are by far the most commonly encountered under laws analogous to Section 939.645. *See, e.g., State v. Wyant; State v. Plowman*, 838 P.2d 558 (Or. 1992). A crime motivated only in small part by bias, and that would have been committed anyway, is not a "hate crime" (or, for that matter, even a "discrimination crime") contemplated by the Wisconsin legislature. As the relative weight of the bias motive dwindles down, it approaches the point of unconscious racism, over which the offender has no control.

If the new language clarifies the meaning of the pre-amendment statute, then the penalty enhancer applies even when bigotry is a minute part of the motive, and the offender is motivated predominantly by some other factor. Using the State's example, the penalty enhancer would apply when an offender batters someone mostly because the victim has provoked him in some way, but in some very small part because of the color of his skin. When the victim's ethnicity is not the

<sup>9</sup> 1991 Wisconsin Act 291, which amended Section 939.645, reads, in pertinent part:

SECTION 1. 939.645(1)(b) of the statutes is amended to read:

1. 939.645(1)(b) Intentionally selects the person against whom the crime under par.(a) is committed or selects the property *that* is damaged or otherwise affected by the crime under par.(a) *in whole or in part* because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, *whether or not the actor's belief or perception was correct.*

The relationship of this amendment to the original statute has never been determined by a Wisconsin court. The significance of this amendment will be discussed more fully in connection with Mitchell's vagueness challenge at Part VII, *infra*.

sole, primary, or "but-for" cause of the defendant's selection of the victim, application of Section 939.645 does not serve any of the State's asserted interests. In fact, the only interest that is served is the State's interest in punishing bigotry itself. This interest is not legitimate.

The hate crime law is further overinclusive because there will be situations in which the defendant did select the victim solely out of bias, but the extra harm the State wishes to redress does not occur. For example, a hate crime may occur without the bigoted motives being communicated to the victim or anyone else. Or, the victim may be aware of the defendant's motive but not be affected by it. In neither case have the extra harms postulated by the State occurred, but the statute still applies.<sup>10</sup> The hate crime law's use of motive as a per se surrogate for the effects the State seeks to redress creates an impermissible and incorrect presumption that those effects will occur every time an offender is motivated, even in minor part, by bias.

The statute is also underinclusive. In some cases, the victim is not selected because of status, but the same effects are created. For example, A vandalizes B's house, not knowing or not caring that B is one of the few Jews in the neighborhood; however, B and others mistakenly believe that the house was vandalized by anti-Semites. In other cases, a bias motive may be present that is not one of the biases proscribed by the statute. The murderers of civil rights activists James Chaney, Andrew Goodman, and Michael Schwerner selected them "because of" their political views and activism, not their races or religions. Likewise, a white pro-civil rights legislator or a heterosexual gay rights activist may be victimized because of their activities. Although these crimes are just as likely to create exactly the effects the State seeks to address, Section 939.645 would not apply.

<sup>10</sup> In the present case, there has been no showing that Mr. Mitchell's motives caused any additional harm to Mr. Reddick beyond that attributable to the battery, or to anyone else. Had Section 939.645 not been invoked, perhaps neither Mr. Reddick nor anyone else even would have been aware of Mr. Mitchell's motives.

Although underinclusiveness does not automatically render a statute unconstitutional, where, as with Section 939.645, the underinclusiveness is based on content and viewpoint, the particular distinctions drawn must satisfy strict scrutiny. In *Erzoznik v. City of Jacksonville*, 422 U.S. 205 (1975), this Court stated that it "frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression." *Id.* 215 (citation omitted). Indeed, "the facial underinclusiveness of [a statute] raises serious doubts about whether [the state] is, in fact, serving, with this statute, the significant interests which [the State] invokes." *Florida Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989). See also *F.C.C. v. League of Women Voters*, 468 U.S. 364, 396 (1984). The State's inclusion of some bases for victim selection, and not others (such as gender, activism, politics, and poverty) that create the same type of harm, raises those serious doubts.

The State has not offered any justification for its selection of subjects. They are not, for example, the traditional "suspect classifications" of equal protection analysis, nor does the State offer any statistical evidence to support an assumption that more or worse crimes are committed in Wisconsin "because of" disability or national origin than "because of" gender or abortion. Rather, the underinclusiveness suggests that the subjects listed in the statute are simply those biases of which the State wishes to express its disapproval.

Section 939.645 is not narrowly tailored and cannot satisfy constitutional standards. Where a motive included in the statutory list exists, the defendant is subject to enhanced penalties, even if there is no harm in addition to that caused by the underlying offense. However, when the motive is a bias not singled out by the State, there can be no enhancement, even if there is substantial additional harm. This irrational result is easily avoided with a neutral enhancement statute, under which punishment would be commensurate with actual harm.

### III. SECTION 939.645 IS SUBSTANTIALLY OVERBROAD IN THAT IT ENHANCES PENALTIES FOR "FIGHTING WORDS" AND OTHER PUNISHABLE EXPRESSION ON A CONTENT- AND VIEWPOINT-SPECIFIC BASIS.

In judging whether a statute is overbroad, "[t]he crucial question. . . is whether the [law] sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Grayned v. Rockford*, 408 U.S. 104, 114-115 (1972). This Court held in *R.A.V.* that even constitutionally unprotected speech may not be punished by laws which make distinctions on the basis of content and viewpoint. Section 939.645 applies to a substantial number of statutes which punish "fighting words," see *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and other punishable expression.<sup>11</sup> Application of the hate crime law to speech offenses results in more severe punishment of those offenses based on bigoted content. Because the statute makes a content-based distinction that is impermissible under *R.A.V.*, it is overbroad.

Moreover, this overbreadth is substantial within the meaning of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). In *Broadrick*, this Court observed that its past precedents had relaxed the traditional rules of standing "to permit - in the First Amendment area - 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" 413 U.S. at 612 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)). This Court has noted that the consequence of this departure from traditional rules of standing is "strong medicine" which, when invoked, requires that the overbroad statute not be enforced, and the wrongdoer escape all punishment.

<sup>11</sup> In fact, Todd Mitchell's actions in the present case are accurately characterized as fighting words. He was not convicted of battery, but of "battery, party to the crime," and solely on the basis of his words that incited others to a breach of the peace, i.e., fighting words. Thus, even if there could be other constitutional applications of Section 939.645, it would still be unconstitutional as applied to Mr. Mitchell.

Some of the State's amici tacitly concede the overbreadth of the hate crime law, but argue that its overbreadth is not substantial because its unconstitutional applications are "limited" and "marginal." See, e.g., Brief of Criminal Justice Legal Foundation at 23-24. On the contrary, the Wisconsin Criminal Code contains numerous speech offenses to which the enhancer applies. See, e.g., §§ 942.01, Defamation; 942.03, Giving False Information for Publication; 943.30, Threats to Injure or Accuse of Crime; 943.31, Threats to Communicate Derogatory Information; 944.20, Lewd and Lascivious Behavior; 944.21, Obscene Material or Performance; 944.23, Making Lewd, Obscene or Indecent Drawings; 946.31, Perjury; 946.32, False Swearing; 946.46, Encouraging Violation of Probation or Parole; 946.64, Communicating with Jurors; 947.01, Disorderly Conduct; 947.013, Harassment. These speech offenses represent quite a large proportion of the Wisconsin criminal statutes to which Section 939.645 would ever be applied.

The Wisconsin Supreme Court has construed Section 947.01, the disorderly conduct statute, to apply to fighting words. *State v. Zwicker*, 164 N.W.2d 512 (Wis. 1969). "Fighting words" offenses often include epithets that would trigger application of the hate crime law. An incident of disorderly conduct involving a boisterous protest against Irish Catholics who refuse to let gays march in a St. Patrick's Day parade may become a "hate crime" if someone utters "fighting words" about Catholicism, heterosexuals, or the Irish (but not the I.R.A.). A malicious slander against a public official is converted from a misdemeanor to a felony "hate crime" if its content evidences one of the outlawed viewpoints. Even if Section 939.645 applied only to crimes involving serious bodily injury, it would be unconstitutional for all of the reasons already discussed. Because it also applies to speech crimes, it is unconstitutional for the additional reason that it is substantially overbroad.

Section 939.645 will inhibit political expression. When minority communities feel victimized by landlords or by retail establishments, disputes will tend to arise across racial or ethnic lines reflecting the differing economic status of the

groups involved. A threat to communicate derogatory information (Wis. Stat. § 943.31) or to injure a business (Wis. Stat. § 943.30), both felonies in Wisconsin, is likely to be interpreted as ethnically or racially motivated. Actions like these are often perceived by the most economically deprived minorities as their only effective response to injustice. Such actions are the very essence of political protest, but Section 939.645 would treat them as hate crimes. The result is punishment of political thought that reflects the legitimate frustrations felt by disadvantaged groups.

The "substantiality" requirement of *Broadrick* ought not even to apply to content- and viewpoint-specific statutes like Section 939.645. In *Broadrick*, the Court repeatedly cautioned that the law challenged there was not "directed at particular groups or viewpoints," and that it "regulat[ed] political activity in an even-handed and neutral manner." *Id.* at 606, 616. Wisconsin's hate crime law is not neutral and evenhanded; it discriminates on the basis of content and viewpoint.

*Broadrick* was a judicial reaction to the overbreadth doctrine's "strong medicine" which prohibited all punishment of a wrongdoer whenever the doctrine applied. A determination that Section 939.645 is overbroad does not require that Todd Mitchell's wrongdoing go unpunished. Todd Mitchell was properly convicted and incarcerated on the underlying charge brought against him. Invalidating the hate crime law as overbroad does not reverse his conviction or totally abate his punishment.

The overbreadth doctrine provides "breathing space" for First Amendment freedoms. *N.A.A.C.P. v. Button*, 371 U.S. 432, 433 (1963). Ideas, thoughts, opinions, and biases are the genesis of all speech. The "strong medicine" of overbreadth which is prescribed for the protection of pure speech is administered too late unless it also protects the ideas, thoughts, opinions, and biases which precede all speech. In this context, where the overbreadth doctrine does not shield the wrongdoer from punishment for his acts, its application is appropriate to preserve this Court's historic commitment to free political discourse.

**IV. SECTION 939.645 IS IMPERMISSIBLY DEPENDENT UPON THE DEFENDANT'S FIRST AMENDMENT ACTIVITY FOR PROOF OF MOTIVE, AND CHILLS OTHERS' EXPRESSION AND ASSOCIATION PROTECTED BY THE FIRST AMENDMENT.**

The First Amendment does not prevent the government from considering a defendant's words, associations, and books when relevant to neutral elements of offenses or sentencing factors. On its face, Section 939.645 does not require evidence of the defendant's words, but in practice its enforcement must inevitably, and probably exclusively, rely upon the defendant's speech and associations for evidence of the motive it seeks to punish. Indeed, it is difficult to imagine what other evidence there could be.<sup>12</sup> As a result, the statute threatens to punish the speech and associations themselves. See Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. Rev. 333, 359-60 (1991) [hereinafter, *Sticks and Stones*].

This "evidence as element" problem arose in *Street v. New York*, 394 U.S. 576, 588-90 (1969). The defendant burned a flag on a street corner and said, "We don't need no

<sup>12</sup> Wisconsin has cited to no case, in any jurisdiction, in which the government, in a prosecution under a law analogous to Section 939.645, relied upon any evidence of motive other than the defendant's speech or associations. See *State v. Wyant*; *State v. Stalder*, No. 91-018929 C.S. 10A (Broward Cty., Fla., Apr. 20, 1992), *jurisdiction accepted*, No. 79, 924 (Fla., June 10, 1992); *State v. Plowman*; *State v. Beebe*, 680 P. 2d 11 (Or. App. 1984); *People v. Grupe*, 532 N.Y.S.2d 815, 818 (N.Y. City Crim. Ct. 1988); *State v. LaDue*, No. 4088-8-90 CM. Cr. (Chittenden Cty., Vt. Apr. 18, 1991), *appeal docketed*, No. 91-313 (Vt. Aug. 5, 1991). It is also worth noting that virtually the only way to defend against a hate crime charge is to offer evidence of "good" speech and associations. In this case Mr. Mitchell's trial attorney felt compelled to present evidence that Mitchell did not express animosity toward whites and had a white girlfriend. (R. 65: 193). In order to counter prosecution testimony of gang associations, Mr. Mitchell was required to present evidence that he did not associate with "undesirable elements."

damn flag." This Court struck down the portion of the challenged statute that prohibited publicly defying or casting contempt upon the American flag by words. Although a "public mutilation" provision survived, this Court refused to uphold the defendant's conviction under that provision because it found it impossible to say that his "words were not an independent cause of his conviction." *Id.* at 589. The defendant could not be punished where his conviction "may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects." *Id.* at 594.

Similarly, in *Tygett v. Washington*, 543 F.2d 840 (D.C. Cir. 1974), the court held that a police officer's dismissal for an "unsatisfactory attitude" that was evidenced solely by protected expression violated the First Amendment.

The words appellant spoke were the only indicia of his attitude, and the attitude was inseparably intertwined with the content of the statements. . . . And it is clear beyond peradventure that but for the remarks. . . . appellant would not have been dismissed from the police force. The first amendment's Free Speech Clause cannot be laid aside simply on the basis that the speaker is penalized not for his speech but for a state of mind manifested thereby.

*Id.* at 845.

Not only does Section 939.645 punish the defendant's speech, thought, and associations, it impermissibly chills others' exercise of these rights. The Wisconsin Supreme Court correctly noted that the chilling effect of Section 939.645 "goes further than merely deterring an individual from uttering a racial epithet during a battery." 485 N.W.2d at 816. The court observed:

All of [a defendant's] remarks upon earlier occasions, any books ever read, speakers ever listened to, or associations ever held could be introduced as evidence that he or she held racist views and was acting upon them at the time of the offense. Anyone charged with one of the underlying offenses could be charged with [intentional selection] as well, and face the possibility of public scrutiny of everything from ethnic jokes to serious intellectual inquiry.

*Id.* at 816 (quoting Gellman, *Sticks and Stones*, *supra*, at 360) (second alteration in original).

Unfortunately, this is no idle speculation on the Wisconsin court's part. In one case, a court found that an officer had probable cause to arrest a suspect for violating a similar law where the officer "had heard through his brother-in-law that [the arrestee] had a history of making racial insults." *Grimm v. Churchill*, 932 F.2d 674, 675-76 (7th Cir. 1991).

Moreover, epithets and slurs are not the only speech chilled by the statute. A person sincerely wondering about subjects such as intermarriage, AIDS, genetic diseases, or integration may well refrain from airing any "politically incorrect" thoughts, knowing that someday they could be examined by the government and introduced as damning evidence in court.

The inherent subjectivity of judgments about defendants' motives also creates "an obvious invitation to discriminatory enforcement." *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971). An especially pernicious danger is the likelihood of disproportionate application of the statute against minorities, particularly young males. In Florida, African-Americans have been arrested on several occasions for violating an analogous law by calling police officers "white crackers." *See, e.g., Hate-Crime Charge Dropped Against Black Man in Florida*, N.Y. Times, Aug. 31, 1991, at 10, col. 6. The FBI's recently released data (*see note 6, supra*) indicate that 30% of the offenders whose race was reported were African-American. FBI Preliminary Report at 2. Studies of hate speech laws in other countries have found grossly disproportionate application against minorities and limited efficacy at best. Sandra Coliver, *Hate Speech Laws: Do They Work? in Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* 363, 363-73 (Sandra Coliver et al., eds., 1992).

The chilling effect of Section 939.645 will lead to a result the State denies it seeks: the de facto illegality of the expression of bigoted thought. As the general public becomes aware of convictions under the statute based solely on defendants' words and associations, people will begin to think of

expressions of bigotry not simply as socially unacceptable, but as "illegal." This effect is not a legitimate state interest.

## V. SECTION 939.645 IS NOT ANALOGOUS TO EXISTING ANTI-DISCRIMINATION LAWS.

In its brief, the State relabels Section 939.645 a "discrimination crime" instead of a "hate crime."<sup>13</sup> The State seeks to repackage the subject by associating "hate crime" laws with our nation's historic efforts to eradicate discrimination against minorities. Ironically, hate crime laws are frequently, as here, used against minorities.

The State's suggestion that if Section 939.645 is unconstitutional then federal and state anti-discrimination laws must also be unconstitutional is incorrect. First, the anti-discrimination laws are not before this Court in the present case. Second, neither the Wisconsin Supreme Court's decision nor this Court's decision in *R.A.V.* provides a basis for a challenge to those laws.

The Wisconsin Supreme Court specifically distinguished the anti-discrimination laws: "Discrimination and bigotry are not the same thing. Under anti-discrimination statutes, it is the discriminatory act which is prohibited. Under the hate crimes statute, the 'selection' which is punished is not an act, it is a mental process." *Mitchell*, 485 N.W.2d at 816 (J.A. 46). In *Wyant*, too, the Ohio Supreme Court noted that "laws against discrimination do prohibit acts committed with a discriminatory motive. However, they are analytically distinct in several ways from the statute in question here. It is the *act* of discrimination that is targeted, not the motive." 597 N.E.2d at 456.

<sup>13</sup> Elsewhere in its brief before this Court, the State admits that it is "obvious, that the Wisconsin Legislature was motivated by a 'desire to suppress hate crimes.'" Brf. Pet. at 23 (quoting *Mitchell*, 485 N.W.2d at 817); (J.A. 48). The State's recharacterization of Section 939.645 as punishing "discrimination crimes," not "hate crimes" as it described them in the Wisconsin court below, is not only a shift in its argument, it is inaccurate.

Under federal laws against employment discrimination, a case can be made under the "disparate impact" test, which requires no showing of any motive. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977). The disparate impact test is not used to raise an inference of motive; rather, it recognizes that employment discrimination is equally possible *without* a motive. The *Wyant* court noted that even under the disparate treatment test, "[i]t is discriminatory *treatment* that is the object of punishment, not the bigoted attitude *per se*." . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." 597 N.E.2d at 456 (quoting *Griggs* at 432). Wisconsin is thus incorrect in its assertion that "the presence of discriminatory motive *alone* affects the sanction imposed on conduct." Brf. Pet. at 31.

The Wisconsin Supreme Court also stressed the difference between the civil remedies provided by anti-discrimination laws and the criminal sanctions imposed by Section 939.645. Certainly, the difference between civil sanctions and loss of liberty is significant, and statutes imposing the latter must be very carefully written and evaluated.

The State also attempts to analogize Section 939.645 to the imposition of punitive damages under 42 U.S.C. Sections 1981 and 1983. These statutes prohibit interference with exercise of equal rights under law for any reason; neither has any "because of" language or any other motive requirement. In addition, Section 1983 requires action under color of state law. *West v. Adkins*, 487 U.S. 40 (1988).

Moreover, even if these civil anti-discrimination laws did turn on motive in the same way as does Section 939.645, they would not be unconstitutional. Unlike Section 939.645, they are narrowly drawn to infringe upon First Amendment rights only insofar as necessary to serve the governmental interests for which they were enacted. In a Title VII case, for example, to the extent that certain motives are implicated in disparate treatment cases, they are so inextricably intertwined with the conduct of the wrongful employment action that there is no

way to sever the regulation of motive from the regulation of conduct.

In Section 939.645, the punishment of the motive is readily severable from the punishment of the conduct. The statute even requires a special verdict. The State can easily reach the conduct without reaching the motive; indeed, it has been doing so for as long as it has had a criminal code. Even without Section 939.645, all the targeted conduct is still punishable. By contrast, elimination of the anti-discrimination laws would leave discrimination victims without any remedy at all.

Nor is there any neutral alternative that would serve the government's compelling interest in equal opportunity that underlies Title VII and other civil anti-discrimination statutes. For example, a statute prohibiting employers from firing employees for *any* reason or requiring employers to make all hiring and promotion decisions by random lot would be content-neutral but clearly irrational. This would not be a viable alternative, nor would a statute that required restaurant owners to serve all customers or that required landlords to rent to all applicants.

The federal criminal statutes dealing with civil rights are no more analogous to Section 939.645. 18 U.S.C. Sections 242 and 243 include the phrases "by reason of his color" and "on account of race," but they each require action under color of state law. 18 U.S.C. Section 245(b)(2) applies to private actors, but only to interference with "federally protected activities" such as attending public school, jury service, applying for employment, participating in government programs, traveling in interstate commerce, or using public accommodations. 18 U.S.C. Section 3631 in effect adds interference with federally protected housing rights to this list.

All of these criminal statutes are examples of the federal government's exercise of its power under the Fourteenth Amendment to guarantee citizens specific federally protected rights. Section 939.645 does not protect any constitutional or federal statutory rights. Not all crimes against a person violate his or her constitutional rights, even when committed by government officials. *Screws v. United States*, 325 U.S. 91,

108-09 (1945). Similarly, Section 1985(3) prohibits conspiracies that have the specific purpose of interfering with others' exercise of certain rights. Section 939.645, by contrast, has no requirement that the offender had a purpose to create any particular interference or other result.

Moreover, both civil and criminal anti-discrimination laws, which are corrective of inequality of opportunity in public spheres of activity, differ fundamentally from laws such as Section 939.645.<sup>14</sup> The federal civil anti-discrimination laws prohibit denial of equal access to opportunities offered to the public, by one acting in a public or commercial arena.<sup>15</sup> Thus, an employer is forbidden to refuse to hire an employee on the basis of the employee's religion, but the employee may refuse to work for an employer on the basis of the employer's religion, even though both acts contribute to workplace imbalance. Restaurant owners and landlords, who hold their establishments open to the public generally, may not turn away diners or tenants based on race, but diners and tenants cannot be forced to choose restaurants or apartments without regard to race. Furthermore, a restaurant owner can constitutionally be compelled to serve Jews in his restaurant, but not in his own home. Some of the federal anti-discrimination laws do not apply unless a minimum number of employees or housing units, for example, are involved. See

<sup>14</sup> Amicus ADL, in contradiction to its position in this Court, has elsewhere expressly distinguished discrimination claims from reportable "bias incidents." According to the ADL, employment discrimination "involves a very different kind of anti-Semitic problem – no less serious to the alleged victim, to be sure, but simply distinct from the openly anti-Jewish acts of hostility under consideration here." ADL 1992 Audit at 24-25.

<sup>15</sup> The words "public" and "private" are sometimes used to refer to governmental and nongovernmental action, respectively. As used in this discussion, "public" refers not to governmental action, but to actions taken with respect to the public at large or in a public or commercial sphere of action, as in "public accommodation."

e.g. 42 U.S.C. Sections 2000a (b)(1) (public accommodations); 3604 (B)(2) (fair housing); 2000e (b) (employment discrimination).

The State's relabeling of hate crimes as "discrimination crimes" is conclusory and circular. As a legal term, "discrimination" means *illegal* selection of persons based on some characteristic. Calling a selection "discrimination" evades the whole analysis. It is a bootstrap argument. It is as if the State wanted to punish assisted suicide and justified its position by calling the new offense "assisting in a self-homicide," then arguing its constitutionality by saying that all "homicide" is punishable. The flaw in this logic is that by calling it "self-homicide" instead of "suicide," the State has begun where it is trying to end up. Not all killings are illegal. When they are, we call them "homicide." That is the difference between the two terms. The same is true of "selection" and "discrimination." Not all selections on the basis of race, etc., are illegal. When they are not, they are not "discrimination."

When a race-based decision is made by a private actor, the law simply does not recognize it as "discrimination." This Court has on several occasions reviewed laws limiting the rights of clubs and associations to exclude persons "because of" race or sex. In each case, the pivotal question was whether the organization was "public" or "private." See, e.g., *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). In making that determination, this Court looks to indicia such as the commercial nature of the activity, the size of the group involved, and whether services were made available to the public generally. Unlike a public actor, a private individual is not denying certain people an equal chance to avail themselves of opportunities held out to the public generally. Wisconsin would not assert that the purpose of Section 939.645 is to ensure "equal opportunity crime."

In *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 764 (1993), this Court stressed that most elements of "general rights are obviously not protected against private

infringement. (A burglar does not violate the Fourth Amendment, for example, nor does a mugger violate the Fourteenth.)" *Id.* at 764. Few rights are protected against private encroachment. *Id.* Justice Souter discussed at length "the constitutional limits of congressional power to regulate purely private action," explaining that the prevention clause of Section 1985(3) prohibits only those private actions that "would, in real terms, be the exercise of state power itself. To the degree that private conspirators would arrogate the State's police power to themselves to thwart equal protection . . . their action would be tantamount to state action," *id.* at 776 (Souter, J., concurring in the judgment and dissenting in part); therefore, government may prohibit those actions.

The State, relying on Justice Bablitch's dissenting opinion below, suggests that because the "intentional selection" of persons "because of" race, etc., can be prohibited to those engaged in legal activities such as housing or employment, *a fortiori*, it can be prohibited to those engaged in illegal activities. This argument has visceral appeal, but it rests on an incorrect premise: that status-based selection in all types of legal activity is prohibitable. The intentional selection of spouses, roommates, authors, or golf partners "because of" race surely does not constitute regulable "discrimination."<sup>16</sup> All of the civil rights laws cited by Wisconsin deal with persons or entities acting within a public or commercial arena, or acting with the specific purpose to interfere with others' exercise of certain constitutional rights, duties, or entitlements; Section 939.645 does not.

There is irony in the State's heavy reliance upon the anti-discrimination laws to justify the punishment of bigoted viewpoints. Anti-discrimination laws are themselves the product of freedom of thought on sensitive issues of race and ethnicity. We would not have those laws today had not the First

<sup>16</sup> In fact, Justice Bablitch's opinion does not compare the motives punished by Section 939.645 to "intentional selection" in all private activity; rather, it makes repeated references to "discrimination in the marketplace." 485 N.W.2d at 820 (Bablitch, J., dissenting) (emphasis added).

Amendment protected the freedom of civil rights activists to hold and to act upon unpopular and government-disapproved beliefs on matters of race.

# **VI. SECTION 939.645 DISCRIMINATES AMONG OFFENDERS BASED SOLELY UPON THE EXERCISE OF THEIR FUNDAMENTAL RIGHTS OF THOUGHT AND EXPRESSION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.**

A law that treats people differently based on their exercise of First Amendment rights is "presumptively invidious" and must undergo strict scrutiny to ascertain whether it is "precisely tailored to serve a compelling governmental interest." *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). People who commit the same predicate offenses are treated differently under Section 939.645 based on the viewpoints they hold and express. One who commits an offense because of some "acceptable" motive is subject to far less severe punishment than one who acts out of ethnic bias.<sup>17</sup>

Wisconsin argues that it can only serve its interests, discussed above, through the enhanced punishment of crimes motivated by ethnic animosity. However, Wisconsin confuses its legitimate interest in punishing violent or destructive acts with regulating hatred and bigotry among individuals. Clearly, controlling violence is within Wisconsin's police

<sup>17</sup> Wisconsin notes that Mr. Mitchell's equal protection challenge to Section 939.645 was found waived by the Wisconsin Court of Appeals. Brf. Pet. at 6-7. The Wisconsin Supreme Court reserved ruling on the equal protection claim. *Mitchell*, 485 N.W.2d at 809 n.2.; (J.A. 28 n.2). In any case, Wisconsin has raised the equal protection issue in its brief before this Court, arguing that "[g]overnments may treat two otherwise identical actors differently if the conduct of one actor was motivated by a desire to discriminate against the race, color, ethnicity or other status of the victim." Brf. Pet. at 7. The equal protection violation inherent in Section 939.645 provides an independent basis for the statute's unconstitutionality, a question reserved by the Wisconsin Supreme Court.

power, but just as clearly, the First Amendment bars Wisconsin from penalizing the thoughts motivating the offender, however despicable the majority may find them. *R.A.V.*, 112 S. Ct. at 2550. Cf. *Police Dept. v. Mosley*, 408 U.S. 92, 96 (1972) (overturning viewpoint-based picketing ordinance on equal protection grounds; "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

That defendants may have violated other criminal laws "because of" their beliefs does not deprive those beliefs of constitutional protection as a fundamental right. If that were the case, then the State of Texas, whose flag desecration statute was held unconstitutional in *Texas v. Johnson*, could have achieved its end by the simple expedient of prohibiting public burning (a legitimate exercise of its police power), and then enhancing the penalty for any person who violated the public burning statute "because of" opposition to the government. Legislatures could enhance penalties for trespass or arson for those who committed them "because of" opposition to abortion or "because of" environmental concerns. Such schemes obviously would fail under strict scrutiny.

So must Section 939.645. Even assuming the validity of Wisconsin's asserted interests, the statute is not "precisely tailored" to serve them. It reaches thought and expression protected by the First Amendment, both by punishing it directly and through its chilling effect. At the same time, although the statute is ostensibly intended to prevent and redress the particular harms assertedly caused by bias motives, it ignores those particular harms when they are created by biases other than those particularly disapproved of by the government. The statute thus does at once both too much and too little and cannot be considered "precisely tailored."

Finally, there is a variety of neutral approaches that would not distinguish among defendants on the basis of their exercise of their thought and belief and that would serve the State's interests at least as well as does Section 939.645. In

the equal protection analysis, as in the First Amendment analysis, the existence of adequate neutral alternatives confirms the unconstitutionality of the statute.

The extra punishment of those who engage in prohibited conduct because they harbor bigoted thoughts as compared to those who do so for "state approved" reasons is an impermissible denial of equal protection. It treats similarly situated people differently based upon their exercise of their fundamental rights of thought and expression, and is not precisely tailored to serve a compelling state interest. For this reason as well, Section 939.645 is facially unconstitutional.

**VII. SECTION 939.645 IS UNCONSTITUTIONALLY VAGUE, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, BECAUSE IT GIVES INADEQUATE NOTICE OF THE PROHIBITED ACTIVITY AND INVITES ARBITRARY AND DISCRIMINATORY ENFORCEMENT.<sup>18</sup>**

In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), this Court explained that vague statutes offend the Due Process Clause because they do not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"; because they fail to give sufficiently "explicit instructions" to avoid "arbitrary and discriminatory enforcement"; and because they inhibit the exercise of First Amendment freedoms. *Id.* at 108-09. The vagueness of Section 939.645 creates all three of these problems.<sup>19</sup>

<sup>18</sup> The Wisconsin Supreme Court reserved ruling on Mr. Mitchell's vagueness claim. 485 N.W.2d at 809 n.2; (J.A. 28 n.2). The reservation of this issue, in addition to Mr. Mitchell's equal protection challenge, counsels that even if this Court declines to affirm, it should return the case to the Wisconsin Supreme Court rather than reversing the judgment below.

<sup>19</sup> The third *Grayned* "vagueness" concern is the chill of protected activity. Vague laws often create that chill, which is discussed in Part IV, *supra*.

As an initial matter, this Court should note that Section 939.645 was amended just one month prior to the Wisconsin Supreme Court's decision in the present case. 1991 Wis. Act 291 (effective May 13, 1992) (*see note 9, supra*). The constitutionality of the pre-amendment statute is before this Court in the present case. One feature of the amendment was to add the words "in whole or in part" before the words "because of." The Wisconsin Supreme Court, having reserved ruling on the vagueness challenge, did not discuss the effect of the amendment upon the interpretation of the pre-amendment Section 939.645 in the present case. That effect is far from clear, and it is critical.

The amendment either clarified the meaning of Section 939.645 or expanded it. If the amendment was a clarification, then pre-amendment Section 939.645 included all mixed motive situations, even those in which the bias motive was only a negligible factor. Moreover, the legislature's having felt the need for a clarifying amendment highlights the inherent ambiguity of the pre-amendment statute. If, on the other hand, the amendment expanded the statute, then there is still no guidance as to the scope of pre-amendment Section 939.645 in mixed motive situations. Furthermore, that would render pre-amendment Section 939.645 a defunct law.

No Wisconsin court has interpreted the scope of the phrase "because of" in pre-amendment Section 939.645, the phrase the Wisconsin Supreme Court considered the critical operative language. It was not necessary for the Wisconsin Supreme Court to do so, because the scope of the statute is irrelevant to its holding that the statute creates a thought crime. In order to determine the constitutionality of the pre-amendment Section 939.645, however, that construction is necessary, and properly ought to be done by Wisconsin's courts.<sup>20</sup> The ambiguity of Section 939.645 in mixed motive

<sup>20</sup> It may be argued that the facts of the present case could support a reasonable conclusion that Mr. Mitchell was solely motivated by race. However, a reasonable trier of fact could have found that he was motivated only partly by race. The jury was never instructed as to what proportion of

situations is a serious flaw. Mixed motive cases are likely to be far more common than pure motive situations. *See, e.g., State v. Wyant; State v. Stalder*. The statute requires that the defendant selected the victim "because of" the victim's ethnicity, but there is nothing to indicate whether the victim's ethnicity must have been the sole or even the predominant reason. The words "because of" could as easily include a substantial reason, a contributing reason, a minor reason, or even an unconscious reason. Thus, the public is left to speculate whether mixed motive situations are included, and if so, which ones. More dangerous, some prosecutors, courts, and juries might apply the statute to some mixed motive situations to which others would not, inviting arbitrary and even discriminatory application and leading to inconsistent results.

This Court has stated that the most important aspect of the void-for-vagueness doctrine is the second *Grayned* concern, "the requirement that a legislature establish minimal guidelines to govern law enforcement," because "[w]here the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender v. Lawson*, 461 U.S. 352, 358

his motive had to be related to race. The trial court said only that the State was required to establish that Mr. Mitchell committed the crime "for the reason that" Mr. Reddick was white. (J.A. 11-12). Therefore, it is impossible to determine what proportion of Mr. Mitchell's motive Mr. Reddick's race was. In all likelihood, the jury, not having been instructed to do so, never considered the question.

Where there is ambiguity in criminal statutes, due process requires that they be construed strictly in favor of the defendant. *Dowling v. United States*, 473 U.S. 207, 213-14 (1985). If the Wisconsin Supreme Court had construed Section 939.645, and done so strictly in favor of Mr. Mitchell, so that sole motivation were required, it would have been forced to vacate his conviction on the ground that there was no showing that the jury found that he was solely motivated by Mr. Reddick's race, even if facts supporting that conclusion were presented. *See McCormick v. United States*, 111 S. Ct. 1807, 1814-15 and n.8 (1991); *Bollenbach v. United States*, 326 U.S. 607, 614-15 (1946).

(1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). The punishment of subjectively offensive motivations central to Section 939.645 creates an "obvious invitation to discriminatory enforcement," *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971), particularly against groups considered dangerous or annoying by local prosecuting officials.

Sadly, this risk is especially severe with respect to minorities. The recent FBI report discloses that members of minority groups are being charged with "hate crimes" under analogous statutes in numbers far in excess of their proportion to the population. Predominantly white police, prosecutors, juries, and judges may be more likely to view an African-American's actions as having been racially motivated than they would a white defendant's identical actions, based upon what they imagine would make them feel conscious of race in the victim's place.

The amendment may have been intended to expand the scope of Section 939.645 in mixed motive situations. More likely, this problem had not been considered at the time of the statute's original enactment, and the amendment was intended to provide a standard where none had previously existed. In either case, the implication is the same: there is simply no way to know how, if at all, pre-amendment Section 939.645 applies to mixed motive situations. Both the public, who must obey the law, and police, prosecutors, and courts, who must enforce and apply it, are left without any guidance. Moreover, such a substantial change in the law renders the statute before this Court, pre-amendment Section 939.645, a dead letter, and there is no point to this Court's reviewing its constitutionality.

### CONCLUSION

Wisconsin surely had the finest of intentions in enacting Section 939.645. People of good will everywhere share Wisconsin's vision of an America free from the curses of bigotry, hate, and violence. It is easy to understand the temptation to give in to feelings of fear and helplessness at the cost of liberty, to see a mirage of an objective approach to legitimate ends where there is in reality only a well-intentioned evasion

of the First Amendment. However, the decisions of this Court throughout the years have taught that an incursion into First Amendment freedom is no less prohibited when employed in the name of good than when employed in the name of evil. Permitting the former invites the latter.

One generation's faith in its own good intentions and judgment must not blind it to the reality that the license it grants to itself today will someday be inherited by others, perhaps less committed to the ideals of brotherhood and tolerance. Had a law like Section 939.645 been in force in Alabama in 1964, when Dr. Martin Luther King, Jr. held a civil rights demonstration without complying with a permit law, he could have been subject to drastically greater penalties.

If Wisconsin's ultimate goal is not just to redress the criminal fruits of intolerance, but to eliminate intolerance altogether, its best hope lies outside of laws like Section 939.645. Wisconsin will not cure bigotry by punishing it, nor teach tolerance by being intolerant. Locking up or silencing the bigots among us will bring only the illusion of mutual acceptance and respect, and reliance upon illusions is dangerous.

Fortunately, government need not choose between punishing thought of which it disapproves on the one hand, and standing silently by while people suffer on the other. Wisconsin is free to espouse the ideals of mutual tolerance and even to punish those who, in rejecting those ideals, hurt others. It

must simply do so in a way that is as faithful to our commitment to liberty as it is to our aspirations to equality. That way is clear.

Respectfully submitted,

KENNETH P. CASEY

Counsel of Record

ELIZABETH E. STEPHENS

131 W. Wilson Street, Suite 100

Madison, Wisconsin 53707

(608) 267-0311

LYNN S. ADELMAN

PAMELA MOORSHEAD

ADELMAN, ADELMAN & MURRAY, S.C.

308 East Juneau

Milwaukee, Wisconsin 53202

(414) 225-2920

SUSAN GELLMAN

8 East Long Street

Columbus, Ohio 43266-0587

(614) 466-5394

*Counsel for Respondent*

**18 U.S.C. § 242. Deprivation of rights under color of law**

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if bodily injury results shall be fined under this title or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

(As amended Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, § 7019, 102 Stat. 4396.)

**18 U.S.C. § 243. Exclusion of jurors on account of race or color**

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any

citizen for such cause, shall be fined not more than \$5,000.

(June 25, 1948, ch 645, § 1, 62 Stat. 696.)

---

**42 U.S.C. § 2000a. Prohibition against discrimination or segregation in places of public accommodation**

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title [42 USC §§ 2000a-2000a-6] if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

- (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
- 

**42 U.S.C. § 2000e. Definitions**

For the purposes of this title [42 USC §§ 2000e et seq.] -

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code [5 USC § 2102]), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [Internal Revenue Code of 1986] except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

---

**SENTENCING GUIDELINES**

**§ 3A1.1 Vulnerable Victim**

If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that the victim was

App. 4

otherwise particularly susceptible to the criminal conduct, increase by 2 levels.

---

**Wis. Stat. § 942.01 Defamation.** (1) Whoever with intent to defame communicates any defamatory matter to a third person without the consent of the person defamed is guilty of a Class A misdemeanor.

(2) Defamatory matter is anything which exposes the other to hatred, contempt, ridicule, degradation or disgrace in society or injury in his business or occupation.

(3) This section does not apply if the defamatory matter was true and was communicated with good motives and for justifiable ends or if the communication was otherwise privileged.

(4) No person shall be convicted on the basis of an oral communication of defamatory matter except upon the testimony of 2 other persons that they heard and understood the oral statement as defamatory or upon a plea of guilty or no contest.

---

**Wis. Stat. § 942.03 Giving false information for publication.** Whoever, with intent that it be published and that it injure any person, and with knowledge that it is false, communicates to a newspaper, magazine, or other publication any false statement concerning any person or

App. 5

any false and unauthorized advertisement is guilty of a Class A misdemeanor.

---

**Wis. Stat. § 943.30 Threats to injure or accuse of crime.** (1) Whoever, either verbally or by any written or printed communication, maliciously threatens to accuse or accuses another of any crime of offense, or threatens or commits any injury to the person, property, business, profession, calling or trade, or the profits and income of any business, profession, calling or trade of another, with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against the person's will or omit to do any lawful act, is guilty of a Class D felony.

(2) Whoever violates sub. (1) by obstructing, delaying or affecting commerce or business or the movement of any article or commodity in commerce or business is guilty of a Class D felony.

(3) Whoever violates sub. (1) by attempting to influence any petit or grand juror, in the performance of his or her functions as such, is guilty of a Class D felony.

(4) Whoever violates sub. (1) by attempting to influence the official action of any public officer is guilty of a Class D felony.

---

**Wis. Stat. § 943.31 Threats to communicate derogatory information.**

Whoever threatens to communicate to anyone information, whether true or false, which would injure the reputation of the threatened person or another unless the threatened person transfers property to a person known not to be entitled to it is guilty of a Class E felony.

---

**Wis. Stat. § 944.20 Lewd and lascivious behavior.** Whoever does any of the following is guilty of a Class A misdemeanor:

(1) Commits an indecent act of sexual gratification with another with knowledge that they are in the presence of others; or

(2) Publicly and indecently exposes genitals or pubic area.

---

**Wis. Stat. § 944.21 Obscene material or performance.** (1) The legislature intends that the authority to prosecute violations of this section shall be used primarily to combat the obscenity industry and shall never be used for harassment or censorship purposes against materials or performances having serious artistic, literary, political, educational or scientific value. The legislature further intends that the enforcement of this section shall

be consistent with the first amendment to the U.S. constitution, article I, section 3, of the Wisconsin constitution and the compelling state interest in protecting the free flow of ideas.

(2) In this section;

(a) "Community" means this state.

(b) "Internal revenue code" has the meaning specified in s. 71.01 (6).

(c) "Obscene material" means a writing, picture, sound recording or film which:

1. the average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole;

2. Under contemporary community standards, describes or shows sexual conduct in patently offensive way; and

3. Lacks serious literary, artistic, political, education or scientific value, if taken as a whole.

(d) "Obscene performance" means a live exhibition before an audience which:

1. The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole:

2. Under contemporary community standards, describes or shows sexual conduct in a patently offensive way; and

3. Lacks serious literary, artistic, political, educational or scientific value, if taken as a whole.

App. 8

(e) "Sexual conduct" means the commission of any of the following: sexual intercourse, sodomy, bestiality, necrophilia, human excretion, masturbation, sadism, masochism, fellatio, cunnilingus, or lewd exhibition of human genitals.

(f) "Wholesale transfer or distribution of obscene material" means any transfer for a valuable consideration of obscene material for purposes of resale or commercial distribution; or any distribution of obscene material for commercial exhibition. "Wholesale transfer or distribution of obscene material" does not require transfer of title to the obscene material to the purchaser, distributee or exhibitor.

(3) Whoever does any of the following with knowledge of the character and content of the material or performance and for commercial purposes is subject to the penalties under sub. (5):

(a) Imports, prints, sells, has in his or her possession for sale, publishes, exhibits, or transfers any obscene material.

(b) Produces or performs in any obscene performance.

(c) Requires, as a condition to the purchase of periodicals, that a retailer accept obscene material.

(4) Whoever does any of the following with knowledge of the character and content of the material is subject to the penalties under sub. (5):

(a) Transfers or exhibits any obscene material to a person under the age of 18 years.

App. 9

(b) Has in his or her possession with intent to transfer or exhibit to a person under the age of 18 years any obscene material.

(5)(a) Except as provided under pars. (b) to (e), any person violating sub. (3) or (4) is subject to a Class A forfeiture.

(b) If the person violating sub. (3) or (4) has one prior conviction under this section, the person is guilty of a Class A misdemeanor.

(c) If the person violating sub. (3) or (4) has 2 or more prior conviction under this section, the person is guilty of a Class D felony.

(d) Prior convictions under pars. (b) and (c) apply only to offenses occurring on or after June 17, 1988.

(e) Regardless of the number of prior convictions, if the violation under sub. (3) or (4) is for a wholesale transfer or distribution of obscene material, the person is guilty of a Class D felony.

(5m) A contract printer or employee or agent of a contract printer is not subject to prosecution for a violation of sub. (3) regarding the printing of material that is not subject to the contract printer's editorial review or control.

(6) Each day a violation under sub. (3) or (4) continues constitutes a separate violation under this section.

(7) A district attorney may submit a case for review under s. 165.25 (3m). No civil or criminal proceeding under this section may be commenced against any person for a violation of sub. (3) or (4) unless the attorney

general determines under s. 165.25 (3m) that the proceeding may be commenced.

(8)(a) The legislature finds that the libraries and educational institutions under par. (b) carry out the essential purpose of making available to all citizens a current, balanced collection of books, reference materials, periodicals, sound recordings and audiovisual materials that reflect the cultural diversity and pluralistic nature of American society. The legislature further finds that it is in the interest of the state to protect the financial resources of libraries and educational institutions from being expended in litigation and to permit these resources to be used to the greatest extent possible for fulfilling the essential purpose of libraries and educational institutions.

(b) No person who is an employee, a member of the board of directors or a trustee of any of the following is liable to prosecution for violation of this section for acts or omissions while in his or her capacity as an employee, a member of the board of directors or a trustee:

1. A public elementary or secondary school.
2. A private school, as defined in s. 115.001 (3r).
3. Any school offering vocational, technical, or adult education that:
  - a. Is a vocational, technical and adult education district school, is a school approved by the educational approval board under s.38.51 or is a school described in s. 38.51(9)(f), (g) or (h); and
  - b. Is exempt from taxation under section 501 (c)(3) of the internal revenue code.

4. Any institution of higher education that is accredited, as described in s. 39.30 (1)(d), and is exempt from taxation under section 501(c)(3) of the internal revenue code.

5. A library that receives funding from any unit of government.

(9) In determining whether material is obscene under sub. (2)(c) 1 and 3, a judge or jury shall examine individual pictures or passages in the context of the work in which they appear.

(10) The provisions of this section, including the provisions of sub. (8), are severable, as provided in s. 990.001(11).

---

**Wis. Stat. § 944.23 Making lewd, obscene or indecent drawings.**

Whoever makes any lewd, obscene or indecent drawing or writing in public or in a public place is guilty of a Class C misdemeanor.

---

**Wis. Stat. § 946.31 Perjury.** (1) Whoever under oath or affirmation orally makes a false material statement which the person does not believe to be true, in any manner, cause, action or proceeding, before any of the following, whether legally constituted or exercising powers as if legally constituted, is guilty of a Class D felony:

- (a) A court;
- (b) A magistrate;
- (c) A judge, referee or court commissioner;
- (d) An administrative agency or arbitrator authorized by statute to determine issues of fact;
- (e) A notary public while taking testimony for use in an action or proceeding pending in court;
- (f) An officer authorized to conduct inquests of the dead;
- (g) A grand jury;
- (h) A legislative body or committee.

(2) It is not a defense to a prosecution under this section that the perjured testimony was corrected or retracted.

---

**Wis. Stat. § 946.32 False swearing.** (1) Whoever does either of the following is guilty of a Class D felony:

- (a) Under oath or affirmation makes or subscribes a false statement which he does not believe is true, when such oath or affirmation is authorized or required by law or is required by any public officer or governmental agency as a prerequisite to such officer or agency taking some official action.

(b) Makes or subscribes 2 inconsistent statements under oath or affirmation in regard to any matter respecting which an oath or affirmation is, in each case, authorized or required by law or required by any public officer or governmental agency as a prerequisite to such officer or agency taking some official action, under circumstances which demonstrate that the witness or subscriber knew at least one of the statements to be false when made. The period of limitations within which prosecution may be commenced runs from the time of the first statement.

(2) Whoever under oath or affirmation makes or subscribes a false statement which the person does not believe is true is guilty of a Class A misdemeanor.

---

**Wis. Stat. § 946.46 Encouraging violation of probation or parole.**

Whoever intentionally aids or encourages a parolee or probationer or any person committed to the department of corrections or the department of health and social services by reason of crime or delinquency to abscond or violate a term or condition of parole or probation is guilty of a Class A misdemeanor.

---

**Wis. Stat. § 946.64 Communicating with jurors.** Whoever, with intent to influence any person, summoned or serving as a juror, in relation to any matter

which is before that person or which may be brought before that person, communicates with him or her otherwise than in the regular course of proceedings in the trial or hearing of that matter is guilty of a Class E felony.

---

**Wis. Stat. § 947.01 Disorderly conduct.** Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

---

**Wis. Stat. § 947.013 Harassment.** (1) In this section:

(a) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.

(b) "Credible threat" means a threat made with the intent and apparent ability to carry out the threat.

(1m) Whoever, with intent to harass or intimidate another person, does any of the following is subject to a Class B forfeiture:

(a) Strikes, shoves, kicks or otherwise subjects the person to physical contact or attempts or threatens to do the same.

(b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.

(1r) Whoever violates sub. (1m) under all of the following circumstances is guilty of a Class A misdemeanor:

(a) The act is accompanied by a credible threat that places the victim in reasonable fear of death or great bodily harm.

(b) The act occurs while the actor is subject to an order or injunction under s. 813.12, 813.122 or 813.125 that prohibits or limits his or her contact with the victim.

(1t) Whoever violates sub. (1r) is guilty of a Class E felony if the person has a prior conviction under this subsection or sub. (1r) involving the same victim and the present violation occurs within 7 years of the prior conviction.

(2) This section does not prohibit any person from participating in lawful conduct in labor disputes under s. 103.53.

---